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"Equal Outcomes": A Constitutional Comparison of Gender Equality Guarantees in the United States and South Africa

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NOTE

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I. INTRODUCTION

The evolution of women's rights throughout history has had significant effects on the cultural and legal climate of the world. Each country has its own approach to gender equality, and each country has an impact on the global mindset on women's roles in society.[1] South Africa, for example, is a new and growing democracy that provides more equality guarantees than even the oldest established democracy – the United States. The exploration of newer ideas and approaches to equality can only benefit the growth and expansion of equal rights in the United States.

The word "equal" is a definitive quantification of sameness.[2] Similarly, Black's Law Dictionary states that "equality" denotes the "quality, state, or condition of being equal; esp[ecially], likeness in power or political status."[3] Although the literal meaning of "equality" seems to insist that equal status, rights, and opportunities can exist between different groups of people, equality in practice will not always result in "same," or even similar,

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1. This Comment seeks to understand different applications of gender equality. This narrow view based only on the rights afforded to men versus women should in no way discount the existence of oppression or disadvantages based on other categorizations such as race or gender identity. Those considerations, however, are beyond the scope of this Comment.

2. *Equal*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/equal?src=search-dict-hed (last visited Nov. 18, 2020) ("of the same measure, quantity, amount, or number s another . . . like for each member of a group, class, or society.").

3. BLACK'S LAW DICTIONARY (11th ed. 2019).

treatment.[4] A review of formal equality versus substantive equality illustrates how equal outcomes sometimes require unequal treatment.

Formal equality has been explained in different ways but, at its core, it is the manifestation of "literal equality" – presuming that everyone should be afforded the same "rights, conditions, and opportunities" under the law.[5] Formal gender equality, therefore, would provide the same opportunities to men and women – regardless of their ability to act on it.[6] Substantive equality, however, accounts for the inevitable inequalities manifested by providing equal opportunities to groups who will be unable to achieve equal outcomes.[7] Substantive gender equality recognizes that men and women have inherent differences that require different treatment and sometimes disproportionate opportunities to reach similar results.[8] Therefore, substantive equality requires preferential treatment be given to the "historically disadvantaged class" when it lacks the ability to achieve an equal result on its own.[9]

This Note explores different models of equality through the evolution of the American approach to formal equality in comparison with the South African approach to substantive equality.[10] Part II of this Note surveys the expansion of the Fourteenth Amendment to sex discrimination and the constitutional development leading to South Africa's equality protections. Part III then explores the recent discussion of an Equal Rights Amendment in America and the impact it would have on gender equality. Subsequently, Part IV examines avenues for change and outlines implementation of a South African approach to better promote substantive gender equality in the United States.

II. CONSTITUTIONAL FRAMEWORK COMPARISON

A. United States of America

The United States is one of the world's oldest democracies governed by one of the oldest constitutions,[11] yet gender equality was not one of the

4. Equal opportunities do not always produce equal status because all people are differently abled. Differential treatment is sometimes necessary to ensure true equality.

5. HELEN IRVING, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 2 (2008); MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 91 (2009).

6. IRVING, *supra* note 5, at 2.

7. *Id.*; KENDE, *supra* note 5, at 91.

8. "Formal equality can produce unequal results; where similar treatment is offered to persons who are not similarly situated, further disadvantage for the disadvantaged may be the outcome." IRVING, *supra* note 5, at 2.

9. KENDE, *supra* note 5, at 91.

10. *Id.* at 9 ("[T]he Constitutional Court embraces 'substantive equality' as opposed to the U.S. Supreme Court's 'formal equality.'").

11. U. S. CONST.; KENDE, *supra* note 5, at 16.

fundamental rights contemplated for its citizens.[12] The Equal Protection Clause has existed since the ratification of the Fourteenth Amendment in 1868.[13] Although the Equal Protection Clause has ostensibly protected against discrimination on the basis of sex ever since,[14] it was not applied in the context of sex discrimination until the 1970s.[15] Even now, other than the Nineteenth Amendment which guarantees women the right to vote,[16] the United States Constitution contains no express prohibition on sex discrimination.[17]

1. Fourteenth Amendment

Congress passed the Fourteenth Amendment as one of three Civil War Amendments to protect the rights of newly freed slaves.[18] The Equal Protection clause of the Fourteenth Amendment prohibits the states from passing or enforcing any laws that "deny to any person within its jurisdiction the equal protection of the laws."[19] Section 5 of the amendment grants

12. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 725 (5th ed. 2017) ("The Constitution as originally drafted and ratified had no provisions assuring equal protection of the laws. This, of course, is not surprising for a document written for a society where blacks were enslaved and where women were routinely discriminated against.").

13. *Id.* at 245, 754.

14. Throughout this Comment, "sex discrimination" will be used in place of "gender discrimination." Gender discrimination encompasses issues of gender identity and expression which is too broad of a discussion for this Comment. Although "gender discrimination" is what is meant, "sex discrimination" is the legally proper way to say it. Supreme Court Justice Ruth Bader Ginsburg used the term "gender discrimination" in her gender rights cases because her secretary at Columbia Law School warned her that the nine white haired men on the Supreme Court probably would not associate "sex discrimination" in its intended manner. Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender: Justice: Supreme Court's Newest Member Speaks at Her Old Law School and Brings Down the House with Her History Lesson about Fighting Bias*, L.A. TIMES, (Nov. 21, 1993), https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html [https://perma.cc/543N-KEU3].

15. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975); Frontiero v. Richardson, 411 U.S. 677, 682–683 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

16. U.S. CONST. amend. XIX

17. KENDE, *supra* note 5, at 101; U.S. CONST.

18. *See* CHEMERINSKY, *supra* note 12, at 245, 754. ("After the Civil War, widespread discrimination against former slaves led to the passage of the Fourteenth Amendment…"); KENDE, *supra* note 5, 102. *See also* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races . . ."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

19. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

Congress the power to enforce these provisions "by appropriate legislation," however, it imposes no obligation on the government to do so.[20] Indeed, the federal government's role is one of remediating specific wrongs, not proactively trying to prevent them.[21] For example, neither the abolition of slavery nor the Fourteenth Amendment were able to eliminate widespread discrimination and institutionalized inequalities against African Americans – segregation was propagated and legitimized throughout education, job opportunities, and public *and* private spheres well into the 1900s.[22]

Although the Fourteenth Amendment was written to grant "any person" equal protections, these protections were not realized for decades.[23] The Equal Protection Clause was intended to protect against racial discrimination and not to afford equality based on gender.[24] Although protection against sex discrimination was not the focus of the legislature's intent in passing the Fourteenth Amendment,[25] the "Notorious" Ruth Bader Ginsburg developed a strategy for addressing the discriminatory effects of gender-biased statutes on women *and men* that eventually led the United States Supreme Court to constitutionalize the protection of sex discrimination under the Fourteenth Amendment.[26] Ginsburg recognized that the distinction between racial discrimination and sex discrimination is that no innate difference exists between black and white beyond the color of one's skin, where inherent biological differences exist between men and women.[27]

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life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*." U.S. CONST. amend. XIV, § 1 (emphasis added).

20. U.S. CONST. amend. XIV, § 5.

21. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 557 (2013) ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."); City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 804, *as recognized in* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

22. *See e.g.* Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954); Plessy v. Ferguson 163 U.S. 537 (1896). Racial discrimination is still a prominent issue in American society today, but the focus of this Comment is how equal protection applies to sex discrimination.

23. "[N]or deny to *any person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

24. As an example, women were denied the right to vote for over 50 years after the ratification of the Fourteenth Amendment. CHEMERINSKY, *supra* note 12, at 882; U.S. CONST. amend. XIX (granting women the right to vote).

25. CHEMERINSKY, *supra* note 12, at 759–60.

26. *See e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). Ruth Bader Ginsburg played a fundamental and historically valuable role in gender equality jurisprudence and her mentions throughout this Comment are in remembrance of some of the first great work she did during her time as an attorney and a Justice.

27. Delivering the opinion of the Court, Justice Ginsburg wrote, "'Inherent differences' between men and women, we have come to appreciate, remain cause for

2. Equal Protection Common Law Development

In 1971, the Supreme Court extended protections against sex discrimination under the Fourteenth Amendment to women for the first time in *Reed v. Reed* when they held an Idaho probate statute mandating preference to men over women violated the Equal Protection Clause.[28] The statute required preference be given to male applicants in designation of estate administrators; thus, where a mother and father submitted competing applications with equal entitlement, the mother was denied based solely on her gender.[29] The decision in *Reed v. Reed* established precedent that expanded Equal Protection beyond race, ushering in a new era of constitutional rights protections based on gender.

After *Reed*, then-attorney Ginsburg began her famous crusade of sex discrimination cases in the Supreme Court with the American Civil Liberties Union ("ACLU").[30] The first of these cases was *Frontiero v. Richardson*[31] in which Justice Brennan articulated a compelling historical review of structurally imposed gender stereotypes in support of recognizing sex as a suspect class.[32] Justice Powell, however, waived the issue of suspect

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celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." U.S. v. Virginia, 518 U.S. 515, 533 (1996) (referencing Loving v. Virginia, 388 U.S. 1 (1967)). Likewise, Justice Brennan previously stated, "Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). *See also* KENDE, *supra* note 5, at 102.

28. Reed v. Reed, 404 U.S. 71, 76 (1971).

29. *Id.* at 73.

Few individuals have had such a dramatic and lasting effect on a particular area of law as Supreme Court Justice Ruth Bader Ginsburg, who directed the work of the ACLU Women's Rights Project from its founding in 1972 until her appointment to the federal bench in 1980. During the 1970s, Ginsburg led the ACLU in a host of important legal battles many before the Supreme Court that established the foundation for the current legal prohibitions against sex discrimination in this country and helped lay the groundwork for future women's rights advocacy. *ACLU HISTORY: A DRIVING FORCE FOR CHANGE: THE ACLU WOMEN'S RIGHTS PROJECT,* ACLU, https://www.aclu.org/other/aclu-history-driving-force-change-aclu-womens-rights-project (last accessed April 6, 2020).

31. *Frontiero*, 411 U.S. at 690–91 (holding a statute unconstitutional for imposing no burden on male servicemembers yet denying benefits to equally situated female servicemembers); The Court agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682.)

32. *Id.* at 684–85 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War

classification as an inquiry for the legislature in his concurrence – seemingly brushing off the constitutional significance of sex discrimination.[33]

Although Ginsburg lost *Kahn v. Shevin*, the next case she argued in the Supreme Court, the majority's reasoning seemed to be more closely aligning with the rationale for substantive equality.[34] The Court's reasoning for upholding the contested statute was that the "state tax law [was] reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[35] The statute gave exemptions from property taxes to widows but not widowers and thereby granted a benefit or an advantage to a previously disadvantaged group.[36] Justice Brennan, wielding his majority opinion from *Frontiero*, maintained in his dissent that a classification based on a suspect class "must be subjected to close judicial scrutiny."[37] Therefore, the Court was not "free to sustain the statute on the ground that it rationally promotes legitimate governmental interests."[38]

Following the loss in *Kahn*, Ginsburg received another favorable ruling in *Weinberger v. Wiesenfeld* on a similar issue and continued to shift the Supreme Court's approach to sex discrimination.[39] Prior to this shift in

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slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.").

33. The concurrence mentioned the fact that Congress was considering the Equal Rights Amendment while this litigation was proceeding as reason to leave the issue of suspect classification to the legislature. *Id.* at 692 (Powell, J., concurring). While this may be a legitimate reason to defer this determination to another time, Powell's statement that "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes" seems to be misled. *Id.* Categorizing sex discrimination against women as a "broad social and political" issue degrades women's right to equal protection under the Constitution and perpetuates the idea that a woman's status is something that must be determined based on what the social climate allows it to be and not as an individual citizen. *Id.* Not to mention – he ended up being wrong! He assumed the ERA was about to pass so why wade into the controversy…

34. Kahn v. Shevin, 416 U.S. 351, 355–56 (1974) (upholding a statute that only provided widows property tax exemption but denied it to widowers). This statute facially discriminated against men (widowers), but the Supreme Court upheld the statute as valid because the differentiation had a "fair and substantial relation to the object of the legislation." *Id.* at 352 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

35. *Id.* at 355.

36. *Id.* at 355.Women in general make up the previously disadvantaged group here, however, it is specifically *widows* addressed in this case.

37. *Id.* at 357 (Brennan, J., dissenting).

38. *Id.*

39. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (involving a differentiation in awarding Social Security Act benefits based on status as a widower). The Act provided benefits to widows and their minor children based on the prior earnings of

constitutional jurisprudence, sex discrimination was only considered under rational basis review, the minimum level of scrutiny.[40] When Ginsburg and the ACLU began arguing for strict scrutiny in sex discrimination cases, the Supreme Court struggled to decide whether gender was a suspect class.[41] The Court refused to recognize gender as a suspect class, but eventually deemed a heightened level of scrutiny appropriate for sex discrimination.[42] The Court applied an intermediate scrutiny test requiring the government to show that the law was substantially related to a legitimate state objective for the first time in *Craig v. Boren*.[43] Although racial discrimination is subjected to a higher level of scrutiny that requires the government to show the law is "narrowly tailored to serve a compelling governmental interest,"[44] this was still a monumental shift in gender equality jurisprudence.

3. Levels of Scrutiny

In the United States, the foundation of equal protection cases relies on whether the "government's classification [is] justified by a sufficient

their deceased husbands yet only provided benefits to the minor children of widowers based on their deceased wife's earning and failed to provide any benefits to the widowers themselves. *Id.* at 637–38. Despite widowers restricted access to the same benefits as widows, the Court's rationale for holding differentiation in the Act unconstitutional was based on the discriminatory effect on "female wage earners by affording the less protection for their survivors than is provided to male employees." *Id.* at 638.

40. Reed v. Reed, 404 U.S. 71, 76 (1971) ("The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective."). *See infra* Part II.A.3.

41. "I continue to adhere to my view that 'classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.'" Geduldig v. Aiello, 417 U.S. 484, 501 (1974) (Brennan, Douglas, Marshall, JJ., dissenting) (quoting Frontiero v. Richardson 411 U.S. 677, 688 (1973)), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95–55, 92 Stat. 2076. *See also Reed*, 404 U.S. at 76 ("The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective."). *See infra* Part II.A.3.

42. *See* Craig v. Boren 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to sex discrimination for the first time). *See infra* Part II.A.3.

43. *Craig*, 429 U.S. at 197 (applying intermediate scrutiny to sex discrimination for the first time) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). This case involved an Oklahoma statute allowing alcohol sales to women over the age of 18 but only to men over the age of 21. *Id.* at 192. Although this case is not necessarily recognized as a noteworthy sex discrimination case where alcohol sales are clearly not as fundamental as equal job opportunities, the impact of this case was important for sex discrimination jurisprudence. *See infra* Part II.A.3.

44. KENDE, *supra* note 5, at 102. *See infra* Part II.A.3.

purpose."[45] However, different types of discrimination are not afforded the same depth of analysis.[46] Courts determine which level of scrutiny to apply based on the identified classification being made: rational basis review, intermediate scrutiny, or strict scrutiny.[47] To determine whether the government is distinguishing between groups of people, the Court has allowed two ways to establish a classification is being drawn: "where the classification exists on the face of the law" or where the law is "facially neutral, but there is a discriminatory impact" or effect.[48] The Supreme Court has specified that a showing of discriminatory impact or effect is "insufficient" to prove a classification based on sex.[49] Rather, to prove a facially neutral law has a discriminatory impact or effect based on sex, there must be proof of a discriminatory purpose behind the law.[50] Once the classification has been identified, the analysis proceeds to determine the level of scrutiny.[51]

Strict scrutiny is reserved for the discrimination against suspect classifications that have been deemed most crucial to protect – namely, classifications like race and national origin.[52] For a law to be upheld under strict scrutiny, the government must prove a compelling interest or purpose for the discrimination and that the objective could not be achieved through "any less discriminatory alternative."[53] Rational basis review, on the other hand, is the bare minimum that every challenged classification must meet.[54] A classification will be upheld under rational basis as long as the government can show that it is "something that the government legitimately may do" and that their chosen action is a "rational way to accomplish the end."[55]

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45. CHEMERINSKY, *supra* note 12, at 726.

46. CHEMERINSKY, *supra* note 12, at 726. ("[S]ufficient justification depends entirely on the type of discrimination."). However, in South Africa, the "stringency of scrutiny of the offending discrimination is to be no less in the one case than in the other." PENELOPE ANDREWS, FROM CAPE TOWN TO KABUL: RETHINKING STRATEGIES FOR PURSUING WOMEN'S HUMANS RIGHTS 105–06 (2012).

47. CHEMERINSKY, *supra* note 12, at 727 ("Once the classification is identified, the next step in analysis is to identify the level of scrutiny to be applied. The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.").

48. CHEMERINSKY, *supra* note 12, at 726–27 ("For instance, a law that requires that all police officers be at least 510" tall and 150 pounds is, on its face, only a height and weight classification. Statistics, however, show that over 40 percent of men but only 2 percent of women will meet this requirement. The result is that the law has a discriminatory impact against women in hiring for the police force.").

49. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 727 (5th ed. 2017) ("Thus, women challenging the height and weight requirements for the police force must show that the government's purpose was to discriminate based on gender.").

50. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

51. CHEMERINSKY, *supra* note 12, at 727.

52. *Id.*

53. *Id.*

54. *Id.* at 728.

55. *Id.*

Intermediate scrutiny, however, is a middle ground between these two levels of scrutiny.[56]

Intermediate scrutiny is the analysis applied to classifications based on gender.[57] The difference between strict and intermediate scrutiny is that the latter only requires a law to be "substantially related to an *important* government purpose," rather than a "compelling" one.[58] This distinction seems to be without much difference – if anything, it is more a difference in utterance than a clear difference in application.[59] Even in practice, the courts appear to apply a sliding scale test for scrutiny.[60] Intermediate scrutiny itself is just a lowered standard of strict scrutiny, yet the courts even apply varying levels of "heightened intermediate scrutiny."[61] This level of scrutiny seems to be a special gray area carved out for sex discrimination so the courts didn't have to deal with the issues related to fitting gender into either of the other groups.[62] Experts in sex discrimination argue that rational basis is clearly too low for discrimination of this kind because it is overwhelmingly "deferential to the government" and would, therefore, allow almost all challenged classifications based on sex to stand.[63] Where rational basis would allow sex discrimination to remain, strict scrutiny in this context would be a road block to protections and further reform in areas where the sexes are differently abled. While strict scrutiny may seem most favorable to those who support gender rights and gender equality, there is a legitimate reason why this higher standard has not been applied in sex discrimination cases.[64]

Despite not originally including gender equality in the Constitution, American gender equality jurisprudence was developed over time by establishing precedent for sex discrimination scrutiny through the Equal

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56. *Id.* at 727.

57. *Id.*

58. *Id.* (emphasis added).

59. Important interests versus compelling interests could easily be interpreted subjectively.

60. "Some critics suggest that although the Court speaks in terms of three tiers of review, in reality there is a spectrum of standards of review . . . the reality is a range of standards."

61. CHEMERINSKY, *supra* note 12, at 729 ("It is argued that in some cases intermediate scrutiny is applied in a very deferential manner that is essentially rational basis review, while in other cases intermediate scrutiny seems indistinguishable from strict scrutiny.").

62. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). CHEMERINSKY, *supra* note 12, at 728–29 ("[T]he Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to be instances where sex is a justifiable basis for discrimination.").

63. CHEMERINSKY, *supra* note 12, at 728 n.9 ("Once the classification is identified, the next step in analysis is to identify the level of scrutiny to be applied. The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.").

64. *See infra* Section IV.A.

Protection Clause.[65] The South African Constitution, however, explicitly provides protection against sex discrimination while still allowing advantages to previously disadvantaged groups to promote equal outcome.[66]

B. South Africa

Like in the United States, the South African Constitution was developed over a period fraught with racial injustices and legalized discrimination.[67] Early British colonists brought with them beliefs of black inferiority that enhanced racism in South Africa for years to come and planted the seeds that nurtured the apartheid regime.[68] After apartheid was institutionalized in 1948,[69] racial discrimination was further legitimized through strict "segregation and denial of political rights on the basis of race"[70] such as requiring blacks to carry special identification and restricting where they could work, live, and travel.[71] This deeply institutionalized segregation essentially stripped black South Africans of their equality and citizenship. When leaders like Nelson Mandela spoke out and fought with the African National Congress ("ANC")[72] against apartheid, these clashing political ideologies pushed the nation to the brink of a civil war.[73]

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65. *See e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

66. S. AFR. CONST., 1996 ch. 2, § 9. Chapter 2 of the South African Constitution is their Bill of Rights.

67. "South Africa acknowledges through its Constitution, that constitutional adjudication occurs against a background of disadvantage and discrimination that are deeply embedded in the political, economic, and legal systems." ANDREWS, *supra* note 45, at 26.

68. KENDE, *supra* note 5, at 18–20. Apartheid was a "powerful, wealthy, and racist [] regime" implemented by the white minority in South Africa that overtook the black majority through forced segregation and disenfranchisement through political and military force. KENDE, *supra* note 5, at 1.

69. KENDE, *supra* note 5, at 23.

70. ROBERT. L. MADDEX, CONSTITUTIONS OF THE WORLD 396 (3d ed. 2008).

71. Erin Blakemore, *The Harsh Reality of Life Under Apartheid in South Africa*, HISTORY, (May 9, 2019), https://www.history.com/news/apartheid-policies-photos-nelson-mandela [https://perma.cc/764Q-CKGB].

72. The ANC drafted a Freedom Charter in 1955 that influenced the final South African Constitution. Nelson Mandela, *Freedom in our Lifetime*, (June 30, 1956), https://www.sahistory.org.za/archive/freedom-our-lifetime-nelson-mandela [https://perma.cc/PLT3-XFHD]. This Freedom Charter was issued just after the Supreme Court outlawed racial segregation in *Brown v. Board of Education.* 347 U.S. 483 (1954); KENDE, *supra* note 5, at 24.

73. MADDEX, *supra* note 69, at 396.
KENDE, *supra* note 5, at 23–28.

1. Fight for Democracy

During the Cold War and as opposition against the apartheid government grew, ANC leaders and political activists were labeled as Communists by apartheid supporters, mercilessly pursued, and imprisoned for their opposition.[74] Although prominent anti-apartheid leaders were imprisoned, their beliefs and their followers were not silenced. While imprisoned, leaders like Mandela corresponded with South African officials and ANC activists who continued pushing for a new democratic South Africa.[75] Support for the ANC eventually increased and international pressures on the South African government became impossible to ignore.[76] In 1990, the political prisoners were freed, the ban on political parties was lifted, and negotiations were able to commence for establishing a democratic South Africa.[77]

When South Africa began transforming itself into a democratic republic, it was clear that racial discrimination would be prohibited, and their new nation would guarantee rights to all citizens that had previously been denied to a majority of South Africans. It was insisted that the people reset as "citizens of a new, free, united and democratic South Africa, and not base [their] structures of government on race or ethnicity."[78] The ANC was advantaged with access to diverse world views and the "ANC people [that] had lived in all continents and had experienced firsthand the pluses and minuses of just about every form of government in the world" aided democratic reform with their experiential knowledge and ideas.[79] During the constitutional drafting period widespread opinion was constantly sought beyond the ANC's own experience such as holding workshops at the University of Western Cape.[80] The conception of this nation-altering document was so crucial that extensive preparations were made before negotiations on the drafting of the document even began.[81]

The drafting process for a new Constitution was a meticulous transition where equality was vital not just to the final product and its prescribed

74. KENDE, *supra* note 5, at 26–27. This is how Nelson Mandela ended up in the infamous Robben Island prison where he spent two decades before becoming South Africa's first democratic president. 27.

75. KENDE, *supra* note 5, at 30.

76. *Id.* at 27, 29.

77. *Id.* at 30.

78. ALBIE SACHS, OLIVER TAMBO'S DREAM 27 (2017).

79. *Id.* at 30.

80. *Id.* at 33. "These workshops dealt with matters such as whether to have a Constitutional Court, the electoral system, the regions, socio and economic rights, and affirmative action." SACHS, *supra* note 77, at 34.

81. "South Africa had a two-stage drafting process. First, elites from the various groups established a transitional framework that developed power to democratic institutions. These institutions then made the crucial second-stage decisions." KENDE, *supra* note 5, at 32.

guarantees but to the crafting process itself.[82] Negotiations commenced between the various political parties in South Africa in what was known as the "Multi-Party Negotiating Process" ("MPNP") where they adopted the 34 Constitutional Principles[83] that would guide the drafting of the Constitution and, likewise, drafted an Interim Constitution[84] to govern the nation over the two years allotted until the final Constitution would be finalized and enacted.[85] This process alone lasted several months and persisted through constant violence and acts of terror intended to prevent negotiations from continuing.[86] The Interim Constitution laid the groundwork for how the government was to be structured, including the highest court in South Africa, the Constitutional Court,[87] which was to ensure that the 34 Constitutional Principles were fulfilled by the final Constitution.[88]

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82. The ANC wanted to "agree in advance to certain basic principles of democracy" and fought to establish "elections by proportional representation to make sure that everybody [could] get into the Parliament that [drew] up the Constitution." The idea of having an "independent Constitutional Court to ensure that the principles [were] agreed to" was vital to this process. SACHS, *supra* note 77, at 38; "The full participation of women in the transitional and electoral structures and processes, laid the groundwork of the new constitution and government" and allowed those participating "early on to debate and resist objections to having a constitution with strong protections for women's rights" as well as "to help determine exactly what those rights would be." ANDREWS, *supra* note 45, at 103.

83. The purpose of the 34 Constitutional Principles was to outline what a newly created constitution should embody. *The 34 Constitutional Principles*, CONSTITUTIONHILL, https://ourconstitution.constitutionhill.org.za/the-34-constitutional-principles/ [https://perma.cc/6MYP-FEXB] (last visited May 10, 2021). The principles provided a detailed map for structuring a government, the powers it would be given, and the rights that all persons should be afforded. *Id.* It was agreed and established that the Constitutional Court would be unable to certify the Constitution if it failed to follow the guidelines set forth in the 34 Constitutional Principles. *The Drafting and Acceptance of the Constitution*, SOUTH AFRICAN HISTORY ONLINE, https://www.sahistory.org.za/article/drafting-and-acceptance-constitution [https://perma.cc/8R2F-HCQ2] (last visited May 10, 2021).

84. "The 1993 Interim Constitution became fairly detailed because it had to potentially govern the country from 1994 elections until enactment of a final Constitution." KENDE, *supra* note 5, at 33.. S. AFR. (INTERIM) CONST. 1993.

85. "The Constitutional Assembly had two years to write a final constitution which had to pass by a two-thirds majority. The Constitutional Assembly, or Parliament, would be made up of the National Assembly and a Senate that represented the provinces." KENDE, *supra* note 5, at 33–34.

86. SACHS, *supra* note 77, at 39.

87. The Constitutional Court is the South African equivalent of the Supreme Court of the United States. It is the highest court in the South African judicial system and has the final decisions to confirm orders of the lower courts. S. AFR. CONST. 1996 Ch. 8, §§ 166–67.

88. S. AFR. (INTERIM) CONST., 1993; KENDE, *supra* note 5, at 34("A new Constitutional Court would also have to 'certify' that the Constitution fulfilled the 34 Constitutional Principles.").

While the next two years between the drafting of the Interim Constitution and the Constitution were extremely difficult, the circumstances under which South Africa's final Constitution was drafted were remarkable. The newly established Constitutional Court[89] even refused to certify the first draft of the Constitution because it failed to meet the 34 Constitutional Principles determined in negotiations.[90] This act not only established the power of judicial review in South Africa in practice, [91] but it embodied the nation's dedication to crafting a transformative document focused on human rights.[92] The importance of equality in the drafting process survived the tensions between political parties – both genders and various races were represented in the decision making, and public input was encouraged and considered.[93]

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89. Consisting of a "Chief Justice of South Africa, the Deputy Chief Justice and nine other judges" who are responsible for deciding constitutional matters "involving the interpretation, protection or enforcement of the Constitution." S. AFR. CONST. 1996 Ch. 8, § 167.

90. KENDE, *supra* note 5, at 37. The amended draft was approved.

91. (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

S. AFR. CONST. 1996 Ch. 8, § 165.

92. The Founding Provisions of the South African Constitution state that this "one, sovereign, democratic state [was] founded" on the values of: "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. [and] (b) Non-racialism and non-sexism." S. AFR. CONST. 196 Ch. 1, § 1.

93. KENDE, *supra* note 5, at 35 ("To its credit, the Constitutional Assembly solicited public participation by innovative means and this input resulted in some change."). The United States Constitution was written under such different circumstances than the South African Constitution. In the United States, the Constitution was drafted by slaveowners who were inclined to keep the current power structure in place. Whereas, in South Africa, the Constitution was written after the racist Apartheid regime was destroyed and they designed a living document that would prevent a similar system from ever resurfacing. "To assist with its implementation, the South African Constitution established several government agencies including a Human Rights Commission and a Commission on Gender Equality. It also established a Truth & Reconciliation Commission that was supposed to facilitate national healing. There are no similar government agencies to guide the implementation of the U.S. Constitution." KENDE, *supra* note 5, at 7. The Supreme Court has the sole responsibility for deciding if the laws of the land are adhering to the Constitution. The Supreme Court has the final say in American Constitutional analysis. While it is important to ensure that the Constitution is not applied based on individual citizens'

Although the majority of injustices in South Africa's past were motivated by race, its Constitution fervently protects against discrimination in *many* forms, including gender.[94] Constitutional Court Justice Richard Goldstone[95] explained why equality guarantees in South Africa are so fundamental:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of [South Africa's] new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[96]

South Africa created a comprehensive Bill of Rights that guarantees rights protections not just to South African citizens but to "*all* people *in*" South Africa.[97] The South African Constitution explicitly directs the Constitutional Court on how to interpret the Bill of Rights.[98] Chapter 2 § 9, the Equality Provision, of the South African Bill of Rights provides specific protections against sex discrimination:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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interpretations of the Constitution, having government agencies that assist in guiding legislation that upholds the changing political and social culture of this country would give people more power and more say (which is important for eliminating gender stereotypes), whereas a single Court may be more apt to uphold the outdated intentions of the original framers.

94. S. AFR. CONST., 1996 Ch. 2, § 9.

95. Justice Goldstone served as a judge on the first Constitutional Court from July 1994 to October 2003. *Justice Richard Goldstone*, CONST. CT. S. AFR., https://www.concourt.org.za/index.php/judges/former-judges/11-former-judges/58-justice-richard-goldstone (last visited Mar. 19, 2020).

96. President of the Republic of South Africa and Another v Hugo, 1997 SACLR LEXIS 91, 1997 (6) BCLR 708 (CC) at para. 41.

97. S. AFR. CONST., 1996 Ch. 2, § 7(1) (emphasis added). This includes travelers and refugees.

98. S. AFR. CONST., 1996 § 39 ("(I) When interpreting the Bill of Rights, a court, tribunal, or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; (b) must consider international law; and (c) may consider foreign law."). The United States Constitution, however, provides no directives on how the Supreme Court should interpret and apply the Constitution. Scholars have suggested that this lack of instruction is responsible for the divide between living constitutionalists and originalists.

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[99]

Unlike the United States Constitution, the South African Constitution *does* explicitly prohibit sex discrimination which required less case law to develop the legal framework for gender equality in South Africa than was necessary in the United States.[100] Nevertheless, the Constitutional Court's interpretation of cases involving sex discrimination is still an important tool for shaping how the Bill of Rights is applied in practice to the people in South Africa.

2. Equality Provision

A textual analysis of Chapter 2 § 9 provides some interesting distinctions between how South African law evaluates discrimination versus American law. Subsection 2 of the Equality provision provides for "legislative and other measures" to authorize affirmative action.[101] This means that the South African Constitution explicitly allows legislative action to provide advantages to groups of previously disadvantaged people, while disallowing that same advantage to groups who had previously retained an advantage over others.[102] This subsection provides an opportunity for the legislature to act in accordance with protecting against discrimination, whereas subsections 3 and 4 focus on how the state is likewise restricted in acting.[103] These subsections

99. S. AFR. CONST., 1996 ch. 2, § 9.The South African constitution was the first constitution to protect against discrimination on the basis of sexual orientation. MADDEX, *supra* note 69, at 396. The inclusive nature of the South African Bill of Rights mirrors the perspective of Oliver Tambo, "You protect people from abuse not because they're black, not because they're white, not because they're in the majority, not because they're in the minority, but because they're human beings." SACHS, *supra* note 77, at 27.

100. S. AFR. CONST., 1996 Ch. 2, § 9.

101. *Id.* at§ 9(2); KENDE, *supra* note 5, at 112.

102. S. AFR. CONST., 1996 Ch. 2, § 9(2); KENDE, *supra* note 5, at 112.

103. S. AFR. CONST., 1996 Ch. 2, § 9(3)–(4).

restrict discrimination by the state *and* private persons.[104] Whereas the United States can only regulate state discrimination by applying the Commerce Clause, the South African Constitution specifically grants the power to regulate state discrimination alongside the private actions of individuals.[105]

Beyond regulating those responsible for discrimination, subsections 3 and 4 in the Equality provision are especially important because they list the protected classes and illustrate the importance of distinguishing between fair and unfair discrimination.[106] All of the protected grounds listed are given the same level of importance – the distinction is in establishing *if the discrimination is fair* on a case-by-case basis. Yet, these subsections fail to provide much explanation as to what constitutes fair versus unfair discrimination.[107] Subsection 4, however, does specify that the prohibition of discrimination extends to both direct *and* indirect discrimination.[108] Subsection 5 specifies that "discrimination on one or more of the grounds" protected under the Equality provision is unfair – "*unless* it is established that the discrimination is *fair*."[109] This explanation seems to be contradictory and, at the very least, lacks clear direction for those who are ultimately responsible for enacting protections against discrimination. Although somewhat lacking in guidance, the South African Equality provision provides the courts with the opportunity to determine what is fair or unfair discrimination.[110]

3. Fairness Determinations

One of the first cases heard by the Constitutional Court discussing equality under the Constitution was *President of South Africa v. Hugo*.[111] Several years after becoming the first President of South Africa, Nelson Mandela issued a pardon for all incarcerated women with children under the age of twelve who had committed nonviolent offenses.[112] Although this pardon seemed facially discriminatory against the pardoned inmates' male counterparts, Mandela's rationale for this decision was to promote and support the importance of the maternal influence in early stages of development.[113] The Court determined that this facial discrimination against men was not

104. *Id.*

105. *See e.g.* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

106. S. AFR. CONST., 1996 Ch. 2, § 9(4).

107. *Id.* at § 9(3)–(4).

108. *Id.* at § 9(4).

109. *Id.* at § 9(5).

110. *Id.* at § 9.

111. President of South Africa and Another v. Hugo, 1997 SACLR LEXIS 91, (6) BCLR 708 (CC).

112. *Id.*

113. *Id.*; KENDE, *supra* note 5, at 117.

"unfair" and, therefore, Mandela's pardon passed the unfair discrimination test and was allowed to stand as constitutional.[114]

Lacking any clear guidance on how to approach the determination of whether the discrimination was unfair, the Court applied the steps laid out in § 9 of the Constitution.[115] Justice Goldstone further explained that equality is not always realized through "identical treatment in all circumstances" and the unfair discrimination analysis should recognize that.[116] With substantive equality and freedom in mind, Goldstone suggested that "each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not."[117] Justice Johann Kriegler's dissent in *Hugo*, however, expressed his preparedness "to accept without deciding, that in very narrow circumstances a generalization – although reflecting a discriminatory reality – could be vindicated if its ultimate implications were equalizing."[118] Kriegler outlined the two criteria he believed should be met if a discriminatory generalization were to be justified in the interests of equality: (1) a "strong indication that the advantages flowing from the perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages;" and (2) "the context would have to be one in which discriminatory benefits were apposite."[119]

4. The *Harksen* Test

Following *Hugo*, the Constitutional Court in *Harksen v. Lane* fleshed out a four-part test for determining whether discrimination was unfair in a housing discrimination case.[120] The *Harksen* test established a rational basis test

114. President of the Republic of South Africa and Another v. Hugo, 1997 SACLR LEXIS 91, (6) BCLR 708 (CC).

115. S. AFR. CONST., 1996 ch. 2, § 9.

116. President of the Republic of South Africa and Another v Hugo, 1997 SACLR LEXIS 91, 1997 (6) BCLR 708 (CC) ("We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.").

117. President of the Republic of South Africa and Another v Hugo, 1997 SACLR LEXIS 91, 1997 (6) BCLR 708 (CC) at para. 41. Goldstone further explained that "a classification which is unfair in one context may not necessarily be unfair in a different context." *Id.*

118. *Id.* at para. 82 (Kriegler, J., dissenting).

119. *Id.* "True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster." *Id.* at para. 77.

120. Harksen v. Lane NO and others 1997 (11) BCLR 1489 (CC).

similar to the lowest level of scrutiny in the United States. Although these cases were heard while the Interim Constitution was in place, the test remains the same as applied to the equality protections in the current South African Constitution.[121] The necessary consideration in the *Harksen* test can be articulated as follows: (1) Does the law differentiate? (2) If so, is the differentiation done for a legitimate reason? (3) Is the differentiation discrimination? and (4) Is the discrimination *unfair*?[122]

The first step of the *Harksen* test requires a determination as to whether the law differentiates between groups of people on its face.[123] This determination can be as simple as in *Hugo* where the pardon was only for women which clearly differentiated between men and women.[124] Even if the differentiation is not glaringly obvious, there will typically be a creative argument as to how the law in question is differentiating between groups of people in its effect. While there may be no merit to an overconfidently crafted claim, it may make it past the first step only to be shot down in the final inquiries.

Like the constitutional scrutiny analysis in American jurisprudence, the second step to determining whether a law is discriminatory requires a rationality test to decide if the differentiation was done for a legitimate reason.[125] If the differentiation serves no purpose and is not rationally connected to some legitimate objective, then the discrimination presumption is strengthened. Yet, if the party responsible for differentiating can prove that a rational connection between the differentiation and its purpose exists *without* discrimination then the differentiation is deemed to be fair.[126] However, even if the rational connection exists, the differentiation may still be found to be discrimination and the fairness determination must be made.

The third step in the *Harksen* test can be determined simultaneously with the second step. The third inquiry asks the court simply to determine if the differentiation is based on one of the listed grounds in § 9(3).[127] If the differentiation *is* based on one of the protected categories, then it *is* discrimination.[128] If the differentiation is discrimination, then the court must determine if the discrimination was unfair regardless of the connection to a legitimate purpose.[129] The final step in the *Harksen* test is to determine

121. S. AFR. CONST.; S. AFR. (INTERIM) CONST., 1993; KENDE, *supra* note 5, at 96.

122. Harksen v. Lane NO and others 1997 (11) BCLR 1489 (CC).

123. S. AFR. CONST., 1996 Ch. 2, § 9(3); KENDE, *supra* note 5, at 95–96.

124. President of the Republic of South Africa and Another v Hugo, 1997 SACLR LEXIS 91, 1997 (6) BCLR 708 (CC).

125. Harksen v. Lane NO and others 1997 (11) BCLR 1489 (CC); KENDE, *supra* note 5, at 95–96 ("The law must draw a *rational* differentiation to be *minimally acceptable*.").

126. Harksen v. Lane NO and others 1997 (11) BCLR 1489 (CC) at 1491–92, 1511–12.

127. KENDE, *supra* note 5, at 96.

128. S. AFR. CONST., 1996 ch. 2, § 9(3); KENDE, *supra* note 5, at 96.

129. S. AFR. CONST., 1996 ch. 2,§ 9.

whether the discrimination is unfair by analyzing the impact on the parties being discriminated against.[130] Textually, § 9(5) explains that discrimination on a listed ground is *presumed unfair* until established otherwise.[131] However, unfair discrimination can be justified depending on the proportionality between the unfair impact of the discrimination and the public interest.[132] The level of "fairness" is dependent on the *impact* of the discrimination.[133] "Fair" discrimination is subject to a "rationality review" as determined by § 9(1); whereas, "unfair" discrimination is subject to a "reasonableness review" as determined by § 9(3) in conjunction with § 36.[134]

5. *Jordan v. State*

Although the South African Constitution allows for legislative measures such as affirmative action to effectuate equality between groups that have historically received disparate treatment, the Constitutional Court has not always agreed on which circumstances may elicit an advantage. Similarly, since the Court has a generous amount of discretion in determining whether discrimination is unfair, it has not consistently applied the principle of unfair discrimination in equality cases. In one such case, the Court in *Jordan v. State* was divided six-to-five on the issue of equality, yet the majority decision seemed to deviate from the Court's previous devotion to reconstructing the balance between previously unequal groups.[135] The issue in *Jordan* was a law prohibiting prostitution that failed to allow prosecutors to charge the clientele.[136] The reason this law was challenged under the equality clause was due to the alleged disparate impact the law had on women.[137]

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130. *Id.*

131. S. AFR. CONST., 1996 ch. 2,§ 9(5).

132. Baker McKenzie, *The Meaning of Unfair Discrimination in South Africa – Part II*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=e12acb7b-d909-4ff5-9668-960776664e5f [https://perma.cc/8ZJW-K4HB].

133. *Id.*; Harksen v. Lane NO and others 1997 (11) BCLR 1489 (CC).

134.

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST., 1996 ch. 2, §36.

135. *Jordan v. State* 2002 (6) SA 642 (CC); KENDE, *supra* note 5, at 117–18.

136. *Jordan v. State* 2002 (6) SA 642 (CC); KENDE, *supra* note 5, at 117.

137. *Jordan v. State* 2002 (6) SA 642 (CC); KENDE, *supra* note 5, at 117–18.

The majority in *Jordan* reasoned that this law was "gender neutral" because it "punishes both female *and* male prostitutes."[138] The dissenting judges disagreed because the practical application of the law was disproportionately affecting women where the majority of prostitutes were overwhelmingly female and the clientele was overwhelmingly male.[139] Justices O'Regan and Sachs argued that "the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality."[140] O'Regan and Sachs claimed this pattern of sexual stereotyping reinforced the view of the female prostitute as the "fallen" whore where the male client was "at best virile, at worst weak."[141] The dissent further reflected that the "differential impact between prostitute and client [was] therefore directly linked to a pattern of gender disadvantage which [the South African] Constitution is committed to eradicating."[142]

This *Harksen* test does not protect against all discrimination as it should and § 9 equips the Constitutional Court with wide discretion in determining whether discrimination is unfair, but change must start somewhere. The South African Constitution is structured to protect human rights and human dignity in a way that protects equality through equal outcomes. Differential treatment and inequality will not be changed overnight, but the South African Constitution has provided an avenue to enact the shift towards substantive equality. Although the United States Constitution is not as generous in its equality protections, the American mindset is shifting and slowly beginning to acknowledge the disparate impact of equal opportunities versus equal

138. *Jordan v. State* 2002 (6) SA 642 (CC) at 9 para.15 (emphasis added); KENDE, *supra* note 5, at 118.

139. *Jordan v. State* 2002 (6) SA 642 (CC) at 35 para. 59; KENDE, *supra* note 5, at 119.

140. *Jordan v. State* 2002 (6) SA 642 (CC) at 36–37 para. 60; KENDE, *supra* note 5, at 119.

141. *Jordan v. State* 2002 (6) SA 642 (CC) at 39 para. 65; KENDE, *supra* note 5, at 119.

142. *Jordan v. State* 2002 (6) SA 642 (CC) at 35 para. 60; KENDE, *supra* note 5, at 119. The alternative approach offered by the dissent to remedy this differential impact was to expand the law to impose liability on both the prostitute and clientele to effectuate stronger deterrence. *Jordan v. State* 2002 (6) SA 642 (CC) at 65 para. 96; KENDE, *supra* note 5, at 120. Several years after the *Jordan* decision, the Sexual Offences and Related Matters Amendment established liability for those persons who "unlawfully and intentionally engages the [sexual] services of a person 18 years or older." Sexual Offences and Related Matters Amendment Act Section No 32, 2007 ch. 2 part 3 ("(1) A person ("A") who unlawfully and intentionally engages the services of a person 18 years or older ("B") , for financial and other reward, favour or compensation to B or to a third person ("C") – for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not: or by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older."). This legislation imposes liability on sex workers' clientele, effectively remedying the issues the dissent so strongly emphasized in *Jordan*. KENDE, *supra* note 5, at 121.

outcomes on disadvantaged groups. One prominent shift has been discussion on a Constitutional amendment guaranteeing equal rights based on sex.

III. EQUAL RIGHTS AMENDMENT

During the decade of prominent attacks on sex discrimination in the 1970s, Congress considered an Equality Rights Amendment ("ERA") to be added to the Constitution:

> SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> SEC[TION] 2 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> SEC[TION] 3. This amendment shall take effect two years after the date of ratification.[143]

This amendment was successfully brought to Congress by Michigan Congresswoman Martha Griffiths who introduced the ERA on the House floor every year from 1955 to 1970 when it passed the House for the first time.[144] The ERA did not pass the Senate in 1970 – it was not until 1972 that the ERA passed both the House and the Senate sending the amendment to be ratified by the states.[145] The Ninety-Second Congress set a time limit on the amendment for ratification – even extending it once – yet the states failed to fulfill the three-quarters requirement for ratification.[146] Although the deadline for ratification had passed, Virginia became the thirty-eighth state to vote to ratify this amendment in August of 2019.[147]

The deadline imposed by the Ninety-Second Congress was a roadblock for ratification until it regained attention in the House in early 2019. The ERA was reintroduced in the House on January 29, 2019.[148] The next day, on January 30, 2019, Congress introduced House Joint Resolution 38 to remove the deadline imposed by the Ninety-Second Congress to allow ratification of

143. H.R.J. Res. 208, 92d Cong., (2d Sess. 1972).

144. Tara Law, *Virginia Just Became the 38th State to Pass the Equal Rights Amendment. Here's What to Know About the History of the ERA*, TIME, (Jan. 15, 2020), https://time.com/5657997/equal-rights-amendment-history/ [https://perma.cc/N2T5-93EQ]; UNITED STATE HOUSE OF REPRESENTATIVES, *GRIFFITHS, Martha Wright*, HIST., ART & ARCHIVES, https://history.house.gov/People/Detail/14160 [https://perma.cc/SNV4-HU5G] (last visited Jan. 29, 2021).

145. Law, *supra* note 144.

146. *Id.*

147. *Id.*

148. H.R.J. 35, 116th Cong. (1st Sess. 2019). The Senate also reintroduced the ERA on March 27, 2019. S.J. Res. 15 , 116th Cong. (1st Sess. 2019).

the ERA when the three-quarters requirement had been met.[149] This resolution, however, never passed the House and was reintroduced again in November 2019.[150] Finally, on February 13, 2020, the House passed the resolution to remove the deadline for ratification and referred it to the Senate the same day.[151] The outlook for this resolution in the Senate did not look promising, especially if Republican Senator Mitch McConnell remains the Senate Majority leader following the 2020 election.[152]

Democrats appeared to be taking an equality and inclusion stance on this amendment. House Speaker Nancy Pelosi stated, "The ERA will strengthen America, unleashing the full power of women in our economy and upholding the value of equality in our democracy."[153] Legal experts have bolstered the validity of this equality stance by arguing that this amendment "could protect women economically" by substantiating "equal pay and preventing pregnancy

149. H.R.J. 38, 116th Cong. (1st Sess. 2019).

150. H.R.J. 79, 116th Cong. (1st Sess. 2019).

151. H.R.J. 79, 116th Cong. (2d Sess. 2020). The resolution passed by a 232 to 183 vote. 166 CONG. REC. H30, 1129–43 (daily ed. Sept. 13, 2020). These votes were almost narrowly divided on party lines with 227 democrats voting yes and 182 republicans voting no. Five republicans voted yes, but none of the democrats voted against the amendment. The only democrats not to vote in favor were the 10 who did not participate in the vote. *FINAL VOTE RESULTS FOR ROLL CALL 70,* OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, (Feb 13, 2020), http://clerk.house.gov/evs/2020/roll070.xml; Danielle Kurtzleben, *House Votes To Revive Equal Rights Amendment, Removing Ratification Deadline*, NPR, (Feb. 13, 2020 12:35 PM), https://www.npr.org/2020/02/13/805647054/house-votes-to-revive-equal-rights-amendment-removing-ratification-deadline.

152. This is due to the party line division on this issue and the Republican majority in the 116th Senate. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last accessed April 1, 2020). The Senate is projected to retain the Republican majority following the 2020 election, however, "party control of the Senate will [not] be decided [until] January" 2021 following the two runoff elections in Georgia. *U.S. Senate Election Results*, WASH. POST, https://www.washingtonpost.com/elections/election-results/senate-2020 (last visited November 11, 2020). [https://perma.cc/4JW5-TDMF]. Senate Majority Leader Mitch McConnell was the main roadblock to passing this amendment in the Senate. Dustin Gardiner, *McConnell, GOP Senate Hold Key to ERA Sex Bias Ban After House Revives Fight*, S.F. CHRON. (Feb. 13, 2020), https://www.sfchronicle.com/politics/article/Equal-Rights-Amendment-to-ban-sex-bias-wins-key-15053708.php. Both "Mitch McConnell and Lindsay Graham are blocking action in the Senate and have both spoken out in opposition to the Equal Rights Amendment." Jessica Neuwirth, *It's time for the Trump administration to drop fight against the Equal Rights Amendment*, COURIER JOURNAL, Aug. 26, 2020, https://www.courier-journal.com/story/opinion/2020/08/26/equal-rights-amendment-trump-administration-ties-up-era-litigation/3420678001/.

153. Kurtzleben, *supra* note 151.

discrimination."[154] Republicans, however, portrayed the fight for gender equality as a dramatic attack on anti-abortion laws.[155]

Thirteen of the 197 Republican Representatives on the 116th Congress were women, and they were "heavily represented" among anti-abortion activists voting against the ERA.[156] Debbie Lesko, a Republican from Arizona, opined that "If ratified, the ERA would be used by pro-abortion groups to undo pro-life legislation and lead to more abortions and taxpayer-funded abortions."[157] Many female anti-abortionists seem to be missing the point that having a choice means being able to choose *not* to get an abortion as well, theirs and other's beliefs on abortion are blurring the lines of the equality argument.

After no further Congressional action on these resolutions, Nevada, Illinois, and Virginia sought a declaration in federal court that the amendment *had* been formally adopted.[158] Judge Rudolph Contreras of the U.S. District Court for the District of Columbia ruled otherwise – stating that Virginia's vote "came after both the original and extended deadlines that Congress attached to the ERA."[159] These states, however, announced on May 3, 2021 their intentions to appeal this ruling and continue the fight to ratify the ERA.[160] In a similar effort to preserve the progress towards a realized REA, the House of Representatives saw a new proposal for the ERA in February 2021 and sent it to committee on April 28, 2021.[161] Likewise, another joint resolution to remove the ratification deadline was introduced in the House in January 2021.[162] This resolution passed the House and was received in the Senate March 18, 2021.[163]

The only threat imposed by the ERA is that women will no longer be constitutionally less than men. The ERA, however, would have a substantive effect on gendered laws and policies. The language proposed by the ERA mirrors that of the Fourteenth Amendment, which suggest that sex

154. *Id.*

155. Republicans against the ERA were concerned that such an amendment would "undo" their strides in enacting anti-abortion laws and regulations. *See infra* text accompanying note 156. Kurtzleben*, supra* note 151.

156. *Id.* The fact that women make up less than seven percent of House Republicans is an issue for another time, but still provides a shocking example of the political injustices to gender equality.

157. *Id.*

158. Pete Williams, *States Appeal Ruling that they Waited Too Long to Ratify the Equal Rights Amendment*, NBC NEWS, (May 3, 2021 3:49 PM), https://www.nbcnews.com/politics/politics-news/states-appeal-ruling-they-waited-too-long-ratify-equal-rights-n1266178 [https://perma.cc/Y75C-H46A].

159. *Id.*

160. *Id.*

161. H.R.J. 17, 117th Cong. (2d sess. 2021).

162. *Id.*

163. *Id.*

discrimination would then be subject to strict scrutiny.[164] This broad application of strict scrutiny to differentiation based on sex would undermine positive steps towards substantive equality by taking an "equality as sameness" rather than an "equity through equal outcome" approach. Strict scrutiny would require practices like affirmative action and laws that benefit women and differentiate based on biological differences to be struck down as unconstitutional.

A look at affirmative action cases shows how strict scrutiny was immediately weaponized against racial benefits.[165] Strict scrutiny has not harbored adequate protection against racism; racial discrimination endures while the successful cases are used to overturn affirmative action.[166] This is clearly the opposite of the outcome preferred by the equality movement. The ERA includes a two-year grace period before the amendment takes full force – this grace period seems to allow public entities and states the time to ensure their laws and policies that currently stand up to intermediate scrutiny can be corrected to meet strict scrutiny standards. This would stop states from passing legislation to help or benefit women. The following Part aims to impart the need for legislation that provides benefits to women.

IV. DISCRIMINATORY IMPACTS AND IMPROVEMENTS IN THE UNITED STATES

Despite constitutional protections and conscientious legislation, there is still much room for improvement when it comes to protecting women from the injustices of systemic discrimination. Subpart A of this discussion explores the importance of the ERA and how it could be adopted alongside systemic change in scrutiny analysis to promote substantive equality outcomes. Subpart B then explains how equality in legal documents such as the Constitution is important in guaranteeing and achieving equality in practice. Legislation has yet to completely remedy the ways that society

164. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell., J., concurring) ("There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.").

165. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (providing greater opportunities for the black minority at the expense of the white majority results in unacceptable reverse discrimination).

166. *See, e.g.*, *id.*

systemically discriminates against women, Subpart C outlines examples including parental leave, lactation breaks for new mothers, and insurance coverage of contraception. Subpart D looks at sex-based price discrimination and how the Pink Tax disproportionately affects women's out of pocket expenses. Reasons why a substantive equality model is important in these areas is included throughout the discussion alongside examples of how the United States can provide equality guarantees in these areas. Finally, Subparts E and F explain the importance of switching to a substantive equality model in the United States and how changing the scrutiny analysis is a crucial step in making genuine equality a reality.

Issues surrounding gender equality and racial equality should not be construed as competing interests, and as such, arguments in favor of one should not be perceived in exclusion of the other but, rather, a combined front for human equality with different needs and applications. Race and gender are both attributes assigned by accident that have absolutely no bearing on one's potential.[167] However, while there is no difference whatsoever between black and white besides what can be seen with the eye, there *are* inherent differences between women and men. Although gender inequality and the historical subordination of women can be compared to racial subordination and inequality, "it cannot be analogized with this experience, either jurisprudentially or practically, nor should women's status be conceptualized as that of a minority."[168] Women as a class are far from a minority – they account for half of the world's population, and, "therefore, also *half of its potential*."[169]

Regardless of the nation, constituency, or community, women represent around half of the total population. Women's rights are intertwined into every family, every community, and every race – it seems surprising to need a discussion for women's rights separate from men's rights given sex discrimination affects every single person.[170] Despite the ubiquitous detrimental impact gender inequality has on subordinating women through unequal access and structural gender stereotypes, the Constitution is still silent on gender equality today.[171]

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167. "And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 411 U.S. at 686–87.

168. IRVING, *supra* note 5, at 35.

169. *Gender Equality*, UNITED NATIONS, https://www.un.org/en/global-issues/gender-equality [https://perma.cc/K4K6-ZUJF] (last visited May 10, 2021).

170. Gender equality will not be realized until by only focusing on women. Discrimination against women continues to enforce male stereotypes as well. However, it is women who are the disadvantaged class from unequal treatment and should receive the benefits of reform.

171. IRVING, *supra* note 5, at 58; *see also* U.S. CONST.

A. Equal Rights Amendment

The lack of explicit equality guarantees in our Constitution sets the United States back almost seventy-five years.[172] Justice Ginsburg observed that "Every constitution in the world written since the year 1950 [. . .] has the equivalent of an equal rights amendment, and we don't."[173] Equal rights for women has been a long-desired change, but would the ERA be the victory that has been hoped for?

Absent strict scrutiny analysis, the ERA could be enforced to have positive outcomes for women's rights. If the United States were to adopt a South African approach to equality outcomes and apply scrutiny standards like their unfair discrimination test, the ERA would be able to coexist with gendered benefits. Justice Ginsburg urged Congress to scrap the current ERA proposal and start anew.[174] Better yet, Congress needs to restart the ratification process of the ERA alongside a shift in the Court's scrutiny analysis to more openly account for advantageous legislation in women's rights.[175]

The application of strict scrutiny to sex discrimination claims would restrict courts from making allowances where legitimate differentiation is necessary.[176] Strict scrutiny applied to sex discrimination would cause serious problems when confronted with actual gender differences like childbearing.[177] Does intermediate scrutiny adequately protect substantive gender equality? It does not. Countries like South Africa equate gender and race as suspect classes while still accounting for inherent gender differences through case-by-case analysis of unfair discrimination. Women – who account for roughly half of the population – belong to various cultures, social groups, sexual orientations, political affiliations, family structures, and communities. Multiple voices are needed to represent the different groups women are a part of in determining "whether a rule or practice is just" based on "the extent to

172. Kurtzleben, *supra* note 151.

173. *Id.*

174. *Id.*

175. It is important to note that Ginsburg's litigation strategy in the early sex discrimination cases to present Equal Protection for sex as something that applied equally to men and that would benefit men and many of her cases involved laws that disadvantaged men. While this was necessary to get the all-male judiciary to understand how these laws were unfair, it may have come at the cost of recognizing that sometimes women truly are disadvantaged and could benefit from legislation that addresses this reality.

176. Any laws viewed as benefiting women would not pass. Therefore, a substantive equality mindset is necessary to allow beneficial treatment to remedy past discriminatory impact.

177. The complexities of the female reproductive system obviously necessitate differential treatment in health care and reproductive health related situations.

which it affirms or undermines their humanity, status, socio-economic disadvantage and agency (dignity, equality, and freedom)."[178]

Intermediate scrutiny was a positive step for gender rights, but it seems that while accounting for the inherent biological differences between men and women, this standard does not allow enough focus on the *necessary* differential treatment these biological differences should elicit. The South African approach to discrimination claims has not been perfect, nor has it been able to bring about the substantive change it was striving for, yet the United States is in a much better place to implement these changes.[179] South Africa is still a young and growing democracy whereas the United States is well established – but South Africa has a twentieth-century constitution that allows for transformative growth into the twenty-first century. The United States needs to jump into the twenty-first century where gender equality should be embedded in our constitution, our laws, and the standards that courts apply to determine the purpose of discriminatory practices. By equating all suspect classes in the United States and enlisting a more South African approach to determining what is fair versus unfair discrimination will allow a more tailored means of achieving substantive equality through the resolution of discrimination claims.[180]

B. Gendered Language in the Law

The use of masculine language in legal instruments is a damning practice for gender equality.[181] To embed equality in our constitution, our laws, and judicial standards, the language used throughout these documents must be inclusive. Although one could argue that masculine pronouns have always been used to refer to people individually and collectively, choosing masculine pronouns to represent men and women further subordinates women. The mindset that masculine language can be used in a gender-neutral fashion harks back to treatment of women as property, referred to only through their fathers or husbands. Even now, people would be uncomfortable if the Constitution read "The executive Power shall be vested in a President of the United States of America. [She] shall hold [her] Office during the Term of four Years."[182] If the United States Constitution were rewritten to replace all of the male

178. Catherine Albertyn, *'The Stubborn Persistence of Patriarchy'? Gender Equality and Cultural Diversity in South Africa*, 2 CONST. CT. REV. 165, 206 (2009).

179. South Africa attempted to initiate wide-scale, progressive change as part of the shift in governmental structure. The United States as well established and have a more stable government and political climate to implement a gradual change than a new democracy would have.

180. Regardless of whether substantive equality was the intention of our white, male founders.

181. It is important to recognize that individual men are not to blame for the mass disparate treatment of women, but rather the institution of male domination in society that has placed men over women in power and privilege. SANDRA FREDMAN, WOMEN AND THE LAW 2 (Clarendon Press, Oxford 1997).

182. U.S. CONST. art. II, § 1.

pronouns with female pronouns, it is doubtful that it would be read as gender-neutral.

The framers of the United States Constitution filled it with many "he shalls" and "he mays" in a time where they had no intention of allowing women the eligibility to share their opinions or vote, let alone to hold the presidency or sit as members of Congress.[183] While the "he shalls" and "he mays" might be interpreted *today* as gender neutral in application, the original intention was clearly not to convey equal opportunity. Gender equality has been a long, ongoing battle for women all over the world, yet in a nation that has made significant gains in treating men and women more equally, Americans are still being governed by a document that uses gender pronouns from over two centuries ago. The use of gendered language can never be neutral unless all genders are represented. Including a female discourse parallel to normalized patriarchal expressions is not "merely a matter of legal precision and formal inclusion," rather, such an inclusion revolutionizes "language as a form of representation" where the exclusion or inclusion of words "may convey privilege or priority."[184]

The social and cultural constructs of what it means to be a man or a woman has changed drastically over just the last ten years – so why have equality protections not been adapted to these constructions? In *Frontiero*, Brennan's majority opinion recognized the improved position of women in American society while emphasizing the changes yet to come: "it can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[185] Women are no longer only homemakers, but congresswomen, judges, presidential candidates, and vice presidents;[186] and, therefore, deserve recognition in American legal instruments. A simple "he [or she] shall hold [the] office" completely reconstrues the male-only intention of the framers and leaves no ambiguity whatsoever as to who is guaranteed rights under the Constitution.

The law is not some abstract, pre-determined institution of right and wrong – it is a functional representation of the ideologies and interests of various groups in society.[187] Gender ideologies have been changing for centuries, yet "the law" has not adapted with it. The male perspective pervades almost every aspect of the law because recognized "interests have

183. IRVING, *supra* note 5, at 42–43.

184. *Id.* at 42.

185. Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973).

186. Presidential Candidates. BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2020 [https://perma.cc/GM23-K3KM] (last visited May 10, 2021); Alexander Burns et al., *Who's Running for President in 2020?*, N.Y. TIMES (updated April 8, 2020), https://www.nytimes.com/interactive/2019/us/politics/2020-presidential-candidates.html [https://perma.cc/D5YF-WWW6]; *Kamala Harris*, THE WHITE HOUSE, https://www.whitehouse.gov/administration/vice-president-harris/ [https://perma.cc/5BVG-GYPW] (last visited May 10, 2021).

187. FREDMAN, *supra* note 181, at 2.

always been predominately male; not only because the vast majority of law-makers have been male, but also because men have dominated over women."[188]

One can argue, as many Republicans opposing the ERA have, that the "[Fourteenth] [A]mendment [already] guarantees *all* citizens the equal protection of the laws."[189] While it is true that the Fourteenth Amendment has been expanded through common law to apply to women and sex discrimination, nowhere in the Constitution are women explicitly guaranteed equal rights with men. New Jersey Republican Jeff Van Drew, who voted in support of the ERA, challenged, "Why would you vote against it? Just in the face of it, you believe in equal rights, you know, for everybody right?"[190] Van Drew's inquiry of opponents mirrors the incredulity of countless women that so many Twenty-First Century legislators and American citizens continue to fight for the political, social, economic, and cultural marginalization of women. To oppose the historical opportunity to *finally* textually equalize men and women on the grounds that doing so may give women the right to control their own bodies is to say, "we don't support gender equality." If Congress ratifies the Equal Rights Amendment, it will be a huge win for gender rights activists and a crucial step towards systemic equality.

C. Benefits Based on Pregnancy

Another area where gender rights activists have been pushing for change is pregnancy-related medical leave and lactation breaks for new mothers. The Court still considers making these provisions, along with maternity leave, to be "special benefits."[191] During the iconic legal battle against sex discrimination in the 1970s, the Supreme Court was simultaneously making a sex-based determination that would set back the realization of substantive equality for women.[192] In *Geduldig*, a woman was denied compensation from a Disability Fund to which she contributed because her disability was arising from a normal pregnancy.[193] The majority blatantly stated, "we cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause."[194] The Court misguidedly determined that it did not "discriminate against any definable group or class" because there was "no risk from which men [were] protected and women

188. *Id.*

189. Natalie Andrews, *House Votes to Eliminate Deadline on Adding ERA to Constitution*, WALL ST. J. (Feb. 13, 2020 12:55 PM), https://www.wsj.com/articles/house-votes-to-eliminate-deadline-on-adding-era-to-constitution-11581610979?mod=searchresults&page=1&pos=1 (emphasis added).

190. *Id.* ("[Van Drew] switched party affiliation in December [2019].").

191. Geduldig v. Aiello, 417 U.S. 484 (1974) (distinguishing pregnancy discrimination from discrimination based on sex).

192. *Id.* (same).

193. *Id.* at 489–92.

194. *Id.* at 494.

[were] not" and "no risk from which women [were] protected and men [were] not."[195]

Obviously, the risks associated with pregnancy only relate to women. Therefore, if women were protected from such risks, it would still be true that there was "no risk from which women [were] protected and men [were] not" and vice versa.[196] In making this decision, the Supreme Court unapologetically claimed the exclusion of benefits arising from pregnancy is not disproportionately affecting women and created a barrier separating pregnancy from being a woman.[197]

Justice Brennan saw the unreasonableness of such a decision and voiced a clearer opinion in his dissent.[198] Brennan questioned why disability related to pregnancy could be so easily discounted when "workers are compensated for costly disabilities such as heart attacks, voluntary disabilities such as *cosmetic surgery or sterilization* [and even] 'normal' disabilities such as *removal of irritating wisdom teeth.*"[199] Brennan's incredulity most likely stems from the fact that "disabilities caused by pregnancy, however, *like other physically disabling conditions covered by the Code*, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life."[200] The idea of even needing to provide comparison of medical costs and the "disability" caused by removing wisdom teeth versus having a human being removed from one's body seems outrageous – one is clearly more "irritating" than the other. However, it seems even more baffling that *sterilization* was covered for men where pregnancy was not covered for women.[201]

Brennan emphasized something the majority seemed to miss – that "despite the Code's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a 'normal' pregnancy – *disabilities suffered only by women*."[202] Brennan's dissent expressed his view that

> By singling out for less favorable treatment a *gender-linked disability* peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect

195. *Id.* at 496–97.
196. *Id.*
197. *Id.*
198. *Id.* at 498–505 (Brennan, J., dissenting).
199. *Id.* at 499–500 (emphasis added).
200. *Id.* at 500 (emphasis added).
201. *Id.* (emphasis added).
202. *Id.* (emphasis added).

> only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout."[203]

This explanation lends itself to the conclusion that "such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[204] Yet, the majority failed to perceive the inherent discrimination in its decision.

The South African Constitution, however, explicitly guarantees equal protection based on pregnancy, thereby avoiding any court-interpreted discrepancies between pregnancy and sex.[205] The United States has made progress in protecting pregnancy discrimination through Title VII, which was enacted to prevent employment discrimination by the federal government "based on race, color, religion, sex, or national origin."[206] Then, the Pregnancy Discrimination Act of 1978 amended Title VII "to prohibit discrimination on the basis of pregnancy."[207] This amendment expanded the definition of "'because of sex' or 'on the basis of sex'" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, *including receipt of benefits*."[208] Although Congress took this step in protecting discrimination in the employment realm, by insisting on a formal equality approach and failing to equate pregnancy with sex, the Court has abdicated an important role that it could have played in guaranteeing substantive equality.

1. Maternity Leave

The issues faced by new and expecting mothers have gained more attention in recent years. Some of the most generous maternity leave plans are found in Europe where new mothers are allowed "to take dozens of weeks of paid leave," whereas the "United States doesn't guarantee them *any*" paid maternity leave.[209] Even in Europe not all leave is "fully paid."[210] For example, women working in the United Kingdom are guaranteed "a whole year (52 weeks) of maternity leave. Thirty-nine of those weeks are partially

203. *Id.* at 501 (emphasis added).

204. *Id.* (emphasis added).

205. S. AFR. CONST., 1996 Ch. 2, § 9; *supra* Section II(B)(1).

206. 42 U.S.C. § 2000e16 (2018).

207. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

208. *Id.* (emphasis added). This amendment did not create a requirement of health insurance benefits for abortions.

209. Michelle Toh, *These countries offer the most generous maternity leave*, CNN, (Jan. 19, 2018), https://money.cnn.com/2018/01/19/news/economy/countries-most-maternity-leave/index.html (emphasis added).

210. *Id.*

paid" which amounts to about "[twelve] fully paid weeks."[211] The United States, however, has been found one the "least generous" countries when it comes to maternity leave.[212] In the United States maternity leave options have been left to "individual employers to decide how much to offer."[213]

The United Nations agency stated that protection is required for new and expecting mothers "to ensure that they will not lose their job simply because of pregnancy or maternity leave."[214] Equality between men and women will not be achieved if there is still differential "opportunity and treatment for men and women at work"[215] – including parental leave.[216] A substantive equality model not only calls for *more* benefits to be provided regarding maternity leave, benefits based on pregnancy, and lactation breaks when a new mother returns to work, but for providing parental leave to new fathers as well. The number of employers who offer "parental" leave are a minority, but it is quickly becoming more common.[217]

The increased desire for parental leave over maternity leave stems partly from Ginsburg's idea that "women would not achieve equality in the workplace as long as men were discouraged from taking on caregiver roles."[218] As of December 2019, the United States was one of "only two countries out of 170 that [did] not currently provide financial support during maternity leave."[219] Although the United States was "one of the few countries without federal paid maternity leave"[220] for a long time, Congress passed the Federal Employee Paid Leave Act in 2019 to provide twelve weeks of paid family or medical leave for federal employees.[221] This paid leave policy would apply to "mothers *and fathers* of newborns, newly adopted children[,]

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. Parental leave refers to time off given to new fathers, as well as new mothers – in place of maternity leave which is provided for women only.

217. Noam Scheiber, *Victory for Fathers in a Parental Leave Case That Could Be a Harbinger*, N.Y. TIMES, (May 30, 2019), https://www.nytimes.com/2019/05/30/business/fathers-parental-leave-jpmorgan-chase.html?auth=login-email&login=email.

218. *Id.*

219. Kate Bennett & Betsy Klein, *Senate approves Ivanka Trump-backed paid family leave for federal employees*, CNN, (Dec. 17, 2019, https://www.cnn.com/2019/12/17/politics/ivanka-trump-federal-paid-family-leave/index.html ("The United States and New Guinea are the only two countries out of 170 that do not currently provide financial support during maternity leave, according to the United Nations.").

220. Jessica Grose, *Why Dads Don't Take Parental Leave*, N.Y. TIMES, (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/parenting/why-dads-dont-take-parental-leave.html?auth=login-email&login=email

221. Federal Employee Paid Leave Act, H.R. 1534, 116th Cong. (2019);; Federal Employee Paid Leave Act, S. 1174, 116th Cong. (2019).

or foster children."[222] However, this benefit would only be available to federal employees and would not be a nationwide benefit for all working Americans.[223]

The Federal Employee Paid Leave Act ("FEPLA") should be, and is, an important step in guaranteeing workplace equality for new parents, but it has not had quite the successful coverage hoped for. Unfortunately, "tens of thousands of federal employees aren't covered under the new paid parental leave law" because it does not include "federal employees who aren't covered by Title 5"[224] There is still much room for improvement of this bill and nation-wide expansion of paid leave policies at every level.

2. Lactation Breaks

Although the Court has refused to see the issues surrounding pregnancy as sex based, legislation regarding parental leave and lactation breaks has gained strides for the equality movement. On a federal level, the Affordable Care Act ("ACA") amended Section 7 of the Fair Labor Standards Act ("FLSA") to require employers to provide "a reasonable break time for an employee to express breast milk for her nursing child for [one] year after the child's birth each time such employee has need to express the milk."[225] The ACA also requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public,

222. Ted Barrett & Ellie Kaufman, *Congress passes defense bill that would give US a space force and federal workers parental leave for the first time*, CNN, (Dec. 17, 2019), https://www.cnn.com/2019/12/17/politics/ndaa-passes-congress-parental-leave-space-force/index.html.

223. "Though the provision applies to federal workers only, Ivanka Trump has said she will continue to advocate for making paid family leave a possibility for all American workers heading into the election year." Bennett & Klein, *supra* note 219.

224. Nicole Ogrysko, *Not all federal employees are covered under the new paid parental leave law, at least not yet*, FEDERAL NEWS NETWORK, (Jan. 8, 2020), https://federalnewsnetwork.com/benefits/2020/01/not-all-federal-employees-are-covered-under-the-new-paid-parental-leave-law-at-least-not-yet/. FEPLA specifically amended the Title 5 leave requirement that applies only to those employees as defined under 5 U.S.C. § 6381(1). *See* 5 U.S.C. § 6381(1) ("[T]he term "employee" means any individual who— (A) is an "employee", as defined by section 6301(2), including any individual employed in a position referred to in clause (v) or (ix) of section 6301(2), but excluding any individual employed by the government of the District of Columbia any individual employed on a temporary or intermittent basis, and any employee of the Government Accountability Office or the Library of Congress; and (B) has completed at least 12 months of service as an employee (within the meaning of subparagraph (A))"); *see also* 5 U.S.C. §§ 6301, 6382.

225. THE AFFORDABLE CARE ACT, 42 U.S.C. § 18001 (2018); 29 U.S.C. § 207(r)(1)(A) (2010).; H.R. 3590, 111th Cong. (2d sess. 2010); U.S. DEPARTMENT OF LABOR, *Work and Hour Division: Frequently Asked Questions – Break Time for Nursing Mothers,* https://www.dol.gov/agencies/whd/nursing-mothers/faq.

which may be used by an employee to express breast milk."[226] The ACA also specified that these breaks would not be required to be compensated, but this amendment still expanded workplace protections for new mothers by setting federal standards for lactation breaks.

Although the amended language of FLSA provided an exemption for any "employer that employs less than [fifty] employees" *if* doing so would "impose an undue hardship,"[227] recent legislation has created additional requirements for public buildings.[228] The Fairness For Breastfeeding Mothers Act of 2019 requires – with reasonable exceptions – that "the appropriate authority of a covered public building [to] ensure that the building contains a lactation room that is made available for use by members of the public to express breast milk."[229] These lactation rooms must be a "hygienic place, other than a bathroom, that (A) is shielded from view; (B) is free from intrusion; and (C) contains a chair, a working surface, and, if the public building is otherwise supplied with electricity, an electrical outlet."[230] This amendment took effect July 25, 2020, which will further expand the long-awaited protections for working mothers.[231]

As more voices speak up about discrimination in the workplace, more steps are being taken to improve protections against pregnancy- and sex-based discrimination. Pregnancy and breastfeeding are biologically linked to women, and the cultural mindset up to this point has not allowed working mothers to balance their full potential at work while providing fully for their children as well. Denying paid maternity leave or the provision of lactation breaks when a new mother returns to work are inherently discriminatory based on sex. Paid parental leave allows working mothers and fathers to spend crucial developmental time with their children and establishes a stronger family unit from the start. The benefits of flexibility in the workplace to promote healthy family structures is not only important to American society at large, but it shows respect for working parents and works to strike down lingering sex stereotypes of women as caregivers and men as the primary breadwinners.

3. Birth Control Coverage

Although many recent strides have been made to guarantee women more benefits relating to reproductive healthcare, the fight for women's health care equality is by no means a new issue. Women have been baffled for decades

226. 42 U.S.C. § 18001; 29 U.S.C. § 207(r)(1)(A); H.R. 3590; U.S. DEPARTMENT OF LABOR, *supra* note 225.

227. 42 U.S.C. § 18001; 29 U.S.C. § 207(r)(1)(A); H.R. 3590; U.S. DEPARTMENT OF LABOR, *supra* note 225.

228. FAIRNESS FOR BREASTFEEDING MOTHERS ACT of 2019. 40 USC 101, 40 U.S.C.A. § 3318 (2020).

229. *Id.*

230. *Id.*

231. *Id.*

at how easily Viagra was given insurance coverage while gaining coverage for birth control is still an ongoing struggle.[232] Women have gained multiple victories in achieving rights to equal healthcare,[233] but "the pill" still lacks equal coverage as Viagra.[234]

The purported difference between Viagra and birth control is that Viagra is a "medical drug that treats a medical condition whereas contraceptives are considered 'lifestyle drugs' that are not medically necessary."[235] In 2012, President Obama's ACA required "employer-provided health insurance" to cover most forms of birth control.[236] Although the pill is available through several different sources,[237] as of 2016, the United States was one of twenty different countries that "*require a prescription* in order to get a monthly supply of the pill."[238] The prescription requirement for the pill limits access to contraceptives for lower income women and those who are not covered by

232. "Within weeks of hitting the U.S. market in 1998, more than half of Viagra prescriptions received health insurance coverage." Geraldine Sealey, *Erections Get Insurance; Why Not the Pill?,* ABC NEWS, (Jan. 14, 2006), https://abcnews.go.com/US/story?id=91538; *see also* Amy Goldstein, *Viagra's Success Fuels Gender Bias Debate*, WASH. POST, (May 20, 1998), https://www.washingtonpost.com/wp-srv/national/longterm/viagra/stories/pills20.htm ("Less than two months after [Viagra] exploded onto the market, more than half the prescriptions for the new drug [were] being subsidized by health plans.").

233. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding a Massachusetts law criminalizing the distribution of contraceptives to unmarried persons a "violation of contraception *per se*" and in violation of single persons rights under the Equal Protection Clause); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding a Connecticut law criminalizing the use of any contraception unconstitutional as a violation of marital privacy).

234.

235. Angela Chen, *Covering Viagra, But Not Birth Control?,* JSTOR DAILY, (Feb. 23, 2016), https://daily.jstor.org/cover-viagra-but-not-birth-control/.

236. Jacqueline Howard, *Trump administration weakens Obamacare birth control coverage mandate*, CNN, (Nov. 7, 2018), https://www.cnn.com/2018/11/07/health/birth-control-exemption-trump-bn/index.html; Chen, *supra* note 235.

237. *About Us*, THE PILL CLUB, https://thepillclub.com/about-us ("[Members] get their birth control prescription online and delivered straight to their mailbox. No more unnecessary doctors visits and long pharmacy lines."). Planned Parenthood offers "10 different birth control products by mail." The "Planned Parent Direct App make it convenient to get birth control pills prescribed and delivered." They also offer other contraceptives that can be picked up at a pharmacy such as "the ring and the patch." *Frequently Asked Questions: Birth Control*, PLANNED PARENTHOOD, https://plannedparenthooddirect.org/.

238. Melissa Mahtani, *It's #FreeThePill day, a day of activism to make birth control available without prescription*, CNN, (May 9, 2019 2:37 PM), https://www.cnn.com/2019/05/09/health/free-the-pill-day-trnd/index.html (emphasis added).

insurance due to the costs associated with doctor's fees and the pills themselves.[239]

The ACA initially required "*almost all* employers" to include contraception in their health plans because insurers were required to "cover all preventative services. No co-pays. No deductibles."[240] The ACA exempted "Houses of worship" but did not extend such exemptions to religiously affiliated non-profits.[241] Those opposed to contraception were less than thrilled and many non-profit religious organizations were "furious" at the lack of religious-exemptions available to them.[242] Although women were still required to have a prescription in order to receive birth control under the ACA, the Act increased access to the pill across pay grades.

The Trump administration has attempted to overturn the ACA by issuing several regulations that "make it much easier for an employer to exclude contraceptive coverage from any health plan it offers."[243] These regulations allow "*any* employer – nonprofit or for-profit – to exclude some or all contraceptive methods and services" based on religious or even simply *moral* objections.[244] Currently, twenty-nine states require contraceptive coverage by insurers that provide coverage for other prescription drugs while twenty-one states allow "employers and insurers to refuse to comply with the contraceptive coverage mandate."[245]

After the ACA was passed, the Supreme Court heard several cases considering "whether religious groups could refuse to comply with regulation requiring contraceptive coverage."[246] In *Burwell v. Hobby Lobby Stores Inc.*, the Court decided that "closely held corporations" could not be forced to adhere to the contraceptive mandate and provide coverage to their employees.[247] Now, the Trump administration is involved in a case to decide "whether the Trump administration may allow employers to limit women's

239. Sealey, *supra* note 232.

240. E.J. Graff, *The Difference Between Viagra and The Pill*, THE AMERICAN PROSPECT, (Jan. 25, 2012), https://prospect.org/health/difference-viagra-pill/.

241. Adam Liptak, *Supreme Court to Consider Limits on Contraception Coverage*, THE NEW YORK TIMES, (Jan. 17, 2020), https://www.nytimes.com/2020/01/17/us/supreme-court-contraception-coverage.html

242. Graff, *supra* note 240.

243. *Insurance Coverage of Contraceptives*, GUTTMACHER INSTITUTE, (April 15, 2020), https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives; Mahtani, *supra* note 238 ("The Trump administration wants to overturn the Affordable Health Act.").

244. Although the moral objection exception applies to a more limited group of employers, specifically those that are "not a publicly traded company." *Insurance Coverage of Contraceptives*, *supra* note 243; Howard, *supra* note 236.

245. *Insurance Coverage of Contraceptives*, *supra* note 243.

246. Liptak, *supra* note 241.

247. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014); Chen, *supra* note 235.

access to free birth control under the ACA."[248] In May 2019, the United States Court of Appeals for the Third Circuit affirmed a nationwide preliminary injunction against the Trump administration's regulations.[249] Oral arguments before the Supreme Court were postponed to May 6, 2020 where the case were reversed and remanded to the Third Circuit.[250]

Low-income women with restricted access to birth control often have to rely on family planning clinics such as Planned Parenthood that may receive federal funding from Title X.[251] The Trump administration, however, "announced shortened funding periods for Title X grants" in 2018 and completely blocked Title X funding in 2019 to clinics that "refer women to abortion services."[252] The cut funding would have helped organizations to cover "STD prevention, cancer screenings and contraception."[253] The ACA worked to decrease "women's contraceptive out-of-pocket expenses by 20 percent," but if the Supreme Court allows the Trump administration's regulations to go into effect in May, the cost of birth control will be widely unaffordable and access to contraception will be more restricted.[254]

248. Liptak, *supra* note 241. This case has notably arisen amid a national conversation over women's rights as several states propose laws that would virtually ban abortion. Mahtani, *supra* note 238.

249. Pennsylvania v. President United States, 930 F.3d 543, 576 (3d Cir. 2019), *cert. granted* Trump v. Pennsylvania, 140 S. Ct. 918 (Jan. 17, 2020), *rev'd* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367 (July 8, 2020).

250. SUPREME COURT DOCKET, https://www.supremecourt.gov/docket/docketfiles/html/public/19-454.html (last visited Nov. 11, 2020); SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2019, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMay2020.pdf (last visited Nov. 24, 2020). Oral arguments were postponed due to concerns related to COVID-19.

251. Shanoor Seervai, Roosa Tikkanen, & Sara R. Collins, *Trump Administration Appeals Contraception Case to SCOTUS: What This Means for Women's Health*, THE COMMONWEALTH FUND, (Oct. 9, 2019), https://www.commonwealthfund.org/blog/2019/what-recent-federal-courts-rulings-contraception-mean-us-womens-health. Title X is a federal grant program aimed at providing comprehensive family planning through education, wellness exams, affordable birth control and other reproductive health care services. *Title X: The Nation's Program for Affordable Birth Control and Reproductive Health Care*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/health-care-equity/title-x.

252. Seervai, Tikkanen, & Collins, *supra* note 251.

253. Sarah McCammon, *Trump Administration Announces Sweeping Changes to Federal Family Planning Program*, NPR, (Feb. 22, 2019), https://www.npr.org/2019/02/22/690544297/trump-administration-proposes-sweeping-changes-to-federal-family-planning-progra.

254. Seervai, Tikkanen, & Collins, *supra* note 251.

Under a new scrutiny analysis, like South Africa's *Harksen* test,[255] pregnancy discrimination would be inherently unfair unless proven otherwise. Any discrimination or differential treatment would be discrimination and it would not matter that the Court did not equate pregnancy with sex – pregnancy discrimination would be considered wrong on its own. Under this new analysis, for pregnancy discrimination to stand, a fairness determination would need to be made based on the circumstantial factors and its impact on those discriminated against. The substantive equality model can be used to derive a non-exclusive list of "Fairness factors" to be applied in the fairness determination stage of the analysis. Doing so will not give the Court complete deferential power, as in South Africa, but will limit the bounds of their decisions in a reasonable manner. Although, it seems unlikely that this type of discrimination would be considered fair.

Likewise, coverage of contraceptives and the requirement of a prescription to receive birth control could be seen as differential treatment of women. Under the *Harksen* test, differential treatment amounts to discrimination, and if it is based on one of the suspect classes (including sex and pregnancy – both of which are involved in the issue of contraception), it is inherently unfair unless proven otherwise. Therefore, the impact of this discrimination would need to be considered in context. Restricted access to birth control affects women's healthcare across the board and, disproportionately so, women in low-income areas.[256] The Third Circuit acknowledged that "cost is a significant barrier to contraceptive use and access" and "the most effective forms of contraceptives are the most expensive."[257] This can lead to an increase in unwanted pregnancies, further draining the resources and finances of low-income families in childcare costs or the costs associated with obtaining abortions.

The United States Center for Disease Control reported a study that "nearly 65% of women ages 15 to 49" use some form of birth control, and the birth control pill has been found to be the "second most common contraceptive method."[258] Women of reproductive age also tend to be disproportionately affected by lack of coverage for contraception. "[S]tudies have shown that women of reproductive age spend about two-thirds more than men on out-of-pocket health-care costs" and that "birth control and reproductive health-care services are believed to account for much of the difference."[259] It is not just

255. Cite to Harksen test (balancing fair versus unfair discrimination against the relative impact of the discrimination)

256. Liptak, *supra* note 241.

257. Pennsylvania v. President United States, 930 F.3d 543, 576 (3d Cir. 2019), *cert. granted* Trump v. Pennsylvania, 140 S. Ct. 918 (Jan. 17, 2020), *rev'd* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367 (July 8, 2020).

258. Jessica Ravitz & Debra Goldschmidt, *Nearly two-thirds of US women use contraception, CDC reports*, CNN, (Dec. 19, 2018, 11:13 AM), https://www.cnn.com/2018/12/19/health/contraceptive-use-cdc-study/index.html.

259. Sealey, *supra* note 232.

women of reproductive age and beyond who face sex discrimination from their inherent biological differences. Young women get firsthand experience of unequal health care and the subordination of female reproductive rights when they go to buy tampons for the first time. Young women face differential treatment through gender-based price discrimination that effects "female marketed" products from birth to retirement.

D. Sex-Based Price Discrimination

Institutionalized sex discrimination has been interwoven into American society for so long that it would be reasonable to ask if the United States can afford to fix it. Many people are aware of sex discrimination through the gender wage gap and the disproportionately low percentages of women in high-level jobs;[260] however, it is the daily discrimination women face that goes unnoticed. One of the most blatant – yet overlooked – discriminatory practices that burden women daily is the Pink Tax. The Pink Tax – also known as "price discrimination" or "gender-pricing" – Is the term used to refer to the extra cost for "female-specific products compared with the gender-neutral goods or those marketed to men."[261] The term "Pink Tax" was chosen to draw attention to the "color of products directly marketed to girls and women."[262]

Although it may be difficult to believe that "pink" items marketed to women would actually cost more than "blue" items marketed to men, studies

260. In the legal profession, women represent 50 percent of J.D.s awarded, yet only 38 percent of the actual workforce. Since men have dominated the legal field for decades it is unsurprising that women still have to catch up. However, what *is* surprising is that of the 38 percent of women in the legal workforce in 2019, those women represented 45.91 percent of Associates while only 22.7 percent of Partners were women. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2, 4 (2019), https://www.americanbar.org/content/dam /aba/administrative/women/current_glance_2019.pdf. The statistics of women's representation in the legal field has no bearing on their ability to perform the same legal tasks as men. In fact, women in the legal field experienced a milestone over the last year when "every journal at the flagship law review of the top 16 law schools was to be led by a woman." Erin Spencer, *First All-Women Class Of Top Law Journal Editors Leaves Behind A Byline And Legacy*, FORBES, (Feb. 11, 2020), https://www.forbes.com/sites/erinspencer1/2020/02/11/first-all-women-class-of-top-law-journal-editors-leaves-behind-a-byline-and-legacy/#46271b4f758e.

261. Anne-Marcelle Ngabirano, *'Pink Tax' forces women to pay more than* men, USA TODAY, (Mar. 28, 2017 3:03 PM), https://www.usatoday.com/story/money/business/2017/03/27/pink-tax-forces-women-pay-more-than-men/99462846/; Candice Elliot, *The Pink Tax: What's the Cost of Being a Female Consumer in 2020?*, LISTEN MONEY MATTERS, (Jan. 25, 2020), https://www.listenmoneymatters.com/the-pink-tax/.

262. Ngabirano, *supra* note 261.

have confirmed this phenomenon.[263] The New York City Department of Consumer Affairs published a multi-industry study[264] of gender pricing comparing "nearly 800 products with clear male and female versions from more than 90 brands sold at two dozen New York City retailers, both online and in stores."[265] The products chosen for this study came from thirty-five different product categories with "similar male and female versions [that] were closest in branding, ingredients, appearance, textile, construction, and/or marketing."[266] The research on these products yielded results showing women's products cost seven percent more on average than their male counterparts.[267] In the thirty-five product categories studied, women paid more in all but five categories – and when men did pay more, it wasn't by much.[268] Overall, "women's products cost more 42 percent of the time while men's products cost more [only] 18 percent of the time."[269]

Although the Pink Tax has gained more attention in recent years, gender-based pricing is by no means a new issue. Nearly twenty-five years ago, a California State Senate studied price discrimination as part of a bill to prohibit "gender-based discrimination in the pricing of services"[270] and found that "adult women effectively pa[id] a gender tax [that] cost[] each woman approximately $1,351 annually."[271] Although the New York City 2015 study did not include annual expense estimates, the results signify that women across the country are paying thousands of dollars more than men for the same

263. N.Y.C. DEP'T OF CONSUMER AFFAIRS, FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER 6 (2015), https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf. The New York City Department of Consumer Affairs first investigated price discrimination in 1992.

264. Specifically, five industries were studied: "toys and accessories, children's clothing, adult clothing, personal care products, and home health care products for seniors." *Id.* at 5.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 5–13.

269. *Id.* at 5.

270. Cal. GENDER TAX REPEAL ACT OF 1995 AB 1100; *Bill Analysis*, SENATE RULES COMMITTEE, http://leginfo.ca.gov/pub/95-96/bill/asm/ab_1051-1100/ab_1100_cfa_950831_152302_sen_floor.html [https://perma.cc/PB6B-4SS2]. Similarly, the New York City Council passed a bill prohibiting the public display of discriminatory pricing based on gender. The Department of Consumer Affairs issued over 100 violations each year to businesses in violation of the New York City gender pricing law. N.Y.C. DEP'T OF CONSUMER AFFAIRS, *supra* note 263, at 16. Press Release, MAYOR GIULIANI SIGNS CITY COUNCIL BILL NO. 804-A INTO LAW, PROHIBITING THE PUBLIC DISPLAY OF DISCRIMINATORY PRICING BASED ON GENDER (Jan. 9, 1998), http://www.nyc.gov/html/om/html/98a/pr019-98.html (on file with author).

271. Cal. GENDER TAX REPEAL ACT OF 1995 AB 1100; *Bill Analysis*, *supra* note 270.

products throughout their lives simply because the products were a certain color or the marketing was targeted at women.

The Pink Tax and its discriminatory effects gained national attention when Representative Jackie Speier introduced the Pink Tax Repeal Act on April 3, 2019.[272] The purpose of this bill was to "prohibit the pricing of consumer products and services that are substantially similar if such products or services are priced differently based on the gender of the individuals for whose use the products are intended or marketed or for whom the services are performed or offered."[273] Had this bill passed, it would have allowed enforcement by the Federal Trade Commission, and state Attorney Generals would be able to initiate civil action against the businesses responsible for discriminatory pricing on behalf of residents who were adversely affected by any violation of the bill.[274] Although the bill did not pass, its recent introduction in the House of Representatives is a positive step towards substantive equality.

1. Tampon Tax

The Pink Tax can also be used to refer to what is known as the "tampon tax" or "period tax" which alternately indicates the sales tax paid to purchase feminine hygiene products such as pads, tampons, and liners.[275] The "tampon tax" is attributed to the Pink Tax since men do not menstruate, therefore, only women are using feminine hygiene products and being disproportionately affected by the sales tax on such items.[276] Since menstruation is an ongoing, continuous cycle, women need products like pads and tampons at least one week out of every month. Pink Tax opponents argue that feminine hygiene products should be tax-exempt as necessities[277] like "groceries and medical supplies."[278] *Feminine* hygiene products are a gender-specific product and

272. H.R. 2048, 116th Cong., (1st Sess. 2019).

273. *Id.* (Defining substantially similar products as products with "no substantial differences in the materials used in the product, the intended uses of the product, and the functional design and features of the product. A difference in coloring among any consumer products shall not be construed as a substantial difference.").

274. *Id.* ("In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is adversely affected by a violation of subsection (a), the attorney general may, as parens patriae, bring a civil action on behalf of the residents…").

275. Leah Asmelash, *Ohio might become the latest state to end the tax on pads and tampons. Here are others that already have*, CNN, (Oct. 15, 2019 1:35 PM), https://www.cnn.com/2019/10/15/health/pink-tampon-tax-ohio-wellness-trnd/index.html.

276. Karen Zraick, *22 States Considered Eliminating the 'Tampon Tax' This Year: Here's What Happened.*, N.Y. TIMES, (July 12, 2019), https://www.nytimes.com/2019/07/12/us/tampon-tax.html.

277. The average American women would most likely view the use of feminine hygiene products as a necessity.

278. Zraick, supra note 276.

taxing such products, therefore, amounts to sex discrimination. The blatant price discrimination from the tampon tax has many people asking "why are tampons taxed when Viagra isn't?"[279]

As of 2019, feminine hygiene products were still "subject to sales taxes in 35 states," and proponents of the tax are citing it as necessary state revenue.[280] One policy analyst described eliminating the tampon tax as a burden because "every time another [tax] exemption is passed, it means the tax rate that applies to everything else will have to increase in order to generate that same amount of revenue."[281] During 2019, twenty-two state legislatures introduced bills to "repeal the [tampon] tax, but none were signed into law."[282] Although California has repealed the tampon tax, it did so with a two-year expiration date because Governor Newsom believes that California "might not be able to afford it past 2021."[283]

Why is it that states cannot afford to cease discriminatory practices? Why are steps not being taken to make it more affordable? Gloria Steinem wrote, "the characteristics of the powerful, whatever they may be, are thought to be better than the characteristics of the powerless – and logic has nothing to do with it."[284] Taxing products like pads and tampons when Viagra is tax-free sends the message that male sexual pleasure is more important than female reproductive health. Most legislators are men who *do not menstruate*,[285] so maybe this issue just is not important to them – or maybe they do not want a remedial tax shift to affect them? Revenue cuts and tax increases are obviously important issues, but women should not be the ones shouldering this expense – a tax increase on gender-neutral products or in other areas entirely will shift this one-sided financial burden off women and onto everyone.

Feminine hygiene/reproductive health products should either be provided or available at lower costs for women as one way to receive an "advantage" or "benefit" to remedy their historical disadvantage. Maybe the higher cost of women's products did not have the same disproportionate impact when men were the sole breadwinners of the family. Now, women are earning their own incomes – even though their salaries have yet to equal that of men's – so it is not just fathers and husbands bearing the cost of feminine necessities – it is the underpaid, historically disadvantaged females.[286] The

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*; *see also* Elliot, *supra* note 261.

283. Asmelash, *supra* note 275.

284. Gloria Steinem, *If Men Could Menstruate*, MS. MAGAZINE, Oct. 1978.

285. Steinem jests that if men *could* menstruate "sanitary supplies would be federally funded and free" and that the male menstrual cycle would be used as further justification for their power and the subordination of women. *Id.*

286. "Women earn 82 cents for every dollar a man earns." Janelle Jones, *5 Facts About the State of the Gender Pay Gap*, U.S. DEPARTMENT OF LABOR BLOG, (Mar. 19, 2021), https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-

issue is not just about the cost of reproductive health products or even women paying more for similar products as men, it is the blatant differential treatment that we have come to accept as "normal" that amounts to systemic sexism.

One could attempt to argue that feminine hygiene products are not essentials for female reproductive health. However, the alternative to using such products would be women either taking so many breaks from their workday to care for whatever method they employed to ensure hygienic and easily contained menstrual bleeding,[287] or simply bleeding through their clothing throughout the workday. This hinderance would affect women in the medical field whose hygiene breaks would have detrimental effects on patient care and pose a health risk if menstrual blood were exposed through their clothing. Similarly, female lawyers would not be able to make it through a court case without needing several breaks, unless they were to face the professional embarrassment of bleeding through their suits. Socially and culturally, it does not seem likely that Americans would be accepting to women walking around with menstrual blood staining their clothing and tarnishing their professionalism.

If a court were to consider the Pink Tax as sex-based discrimination, it would most likely see the tax on tampons as facially neutral.[288] While taxing products used *only by women* so obviously has a discriminatory effect *on women*, facially neutral laws contested due to a discriminatory impact based on sex must prove a discriminatory purpose behind the law.[289] It does not seem likely that one could prove the tampon tax was imposed specifically to further subordinate women through differential pricing.[290]

It seems unlikely that price discrimination would falter when put to intermediate scrutiny. Therefore, systemic change in place of the current scrutiny analysis would better benefit gender equality and substantive equality across the board. If the American constitutional analysis of sex discrimination were focused simply on the discriminatory outcome and impact – without the restrictions of discriminatory purpose – true substantive equality could be within reach. The South African equality analysis is focused on the

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gap#:~:text=1.,for%20many%20women%20of%20color [https://perma.cc/CKA3-EG33]. In 2020, women made 82.3% of men's salaries annually – and "the gap is even wider for many women of color." *Id.*

287. Presumably some sort of towel similar to women in "period poverty" who live in "resource-poor parts of countries." These women, "owing to lack of availability of adequate products, use old clothes, paper, cotton or wool pieces, and even leaves to manage their menstrual bleeding." Rashmi Verda, *Menstrual Hygiene in Africa: No pad or no way to dispose it*, DOWN TO EARTH (April 2, 2019), https://www.downtoearth.org.in/news/waste/menstrual-hygiene-in-africa-no-pad-or-no-way-to-dispose-it-63788.

288. Others, including myself, however, would see this as overtly differential treatment. Especially when compared to tax exempt Viagra.

289. *See supra* Part II.A.3.; s*ee*, *e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

290. No one is going to say, "Since women make less than men, the tampon tax was created to further financial gender disparity."

discriminatory impact on suspect classes,[291] while American jurisprudence allows sex discrimination and differential treatment to stand simply because no one could prove that the discrimination was purposeful.

E. Substantive Equality Versus Formal Equality

The Supreme Court has typically taken the stance that gender preferences will "perpetuate stereotypes," therefore favoring equal opportunity over equal outcome.[292] This mindset is consistent with the idea of formal equality and seems to lend support to the stance that sex discrimination should only receive intermediate scrutiny – whereas racial discrimination receives strict scrutiny – due to the potential problems emerging from legitimate gender differences.[293] Since formal equality provides facial neutrality even where the outcome still results in one party being advantaged over the other, its application ends up ignoring the inherent differences between genders in ways that further disadvantage women.

Although the United States Constitution does not explicitly allow for affirmative action as a method for resolving disadvantages caused by sex discrimination, nor does it impose any obligations to enact legislation protecting gender equality, the courts have considered affirmative action an important issue in the context of race-based college admission.[294] These rulings, however, come with the "requirement that all race-conscious

291. S. AFR. CONST., 1996, ch. 2 § 9(3).

292. KENDE, *supra* note 5, at 104–08; *see* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (concluding that a policy excluding men from attending an all-women's nursing school was in violation of the Equal Protection Clause). Justice Sandra Day O'Connor argued that exclusion of men from this school perpetuated the stereotype of nursing as a "woman's job." *Id.* at 729. The Court, however, has not rejected all sex stereotypes. *See* Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a law requiring only men to register for the draft and barring women from combat). This case is another example of the Court recognizing gender differences in a way that is potentially harmful to women. While it may be seen as a benefit to women that they are not required to register for the draft, the same logic from *Hogan* could be used here. Barring women from combat and only requiring men to register for the draft perpetuates the stereotype that women are fragile and need protecting while combat is exclusively a man's job.

293. *See supra* Section II.A.3.

294. *See* Gratz v. Bollinger, 539 U.S. 244, 271–75 (2003) (finding that the admissions policy violated the Equal Protection Clause because substantial consideration of race was not accompanied by adequate individualized consideration and, therefore, was not "narrowly tailored to achieve [the school's] asserted compelling interest in diversity."); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding the use of race as a predominant factor in the admissions process was narrowly tailored to "further a compelling interest in obtaining the educational benefits that flow from a diverse student body" and, accordingly, not prohibited by the Equal Protection Clause). This was the first time the Supreme Court had addressed "the use of race in public higher education [in] over 25 years" since *Bakke*. *Id.* at 322 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

admissions programs have a termination point" which the Court estimated should come by 2028.[295] Even though affirmative action has yet to provide advantages to women as a previously disadvantaged class, the implications from its application to race illustrate the Court's perception[296] of affirmative action in practice.

Justice Antonin Scalia explained in his view that the "government can never have a 'compelling interest' in discrimination on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[297] Scalia further explained that advantaging a historically disadvantaged group only serves to perpetuate the thinking that disadvantaged them in the first place.[298] Scalia's view provides a reflection of the disparity between South Africa's recognition that the disadvantages caused by structural racial and gender inequalities are attributed to past government actions whereas the United States views itself as free of transgression.[299]

Substantive equality in South Africa was birthed from a history of racial discrimination, yet it still extended equality protections to protect a multitude of suspect classes beyond race.[300] The United States also has a history of racial injustices that had major impacts on legislation and public policy.[301] Although strides towards racial equality have been short and gradual, race is considered a protected "suspect class" subject to a stricter level of scrutiny than sex discrimination.[302] While concrete objections exist for why sex should not be subjected to strict scrutiny, arguments against sex as a suspect class seem to promote ideas of women as second-class citizens. Sex should be a suspect class afforded advantages promoted by substantive equality in

295. *Id.* at 342–43.

296. The fact that the Court has allowed race-based affirmative action to stand for a span of time seems to show an awareness that it is appropriate to allow "fair" discrimination to achieve substantive equality and equal outcomes.

297. Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual.").

298. *Id.* ("To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.").

299. *See supra* Section II.B.

300. S. AFR. CONST., 1996, ch. 2 § 9(3).

301. *See, e.g.*, Khushbu Shah & Juweek Adolphe, *400 Years Since Slavery: A Timeline of American History*, THE GUARDIAN, (Aug. 16, 2019), https://www.theguardian.com/news/2019/aug/15/400-years-since-slavery-timeline [https://perma.cc/72XB-REMJ]; Scott Jaschik, *Guidance on Diversity*, INSIDE HIGHER ED, (Dec. 5, 2011), https://www.insidehighered.com/news/2011/12/05/obama-administration-issues-affirmative-action-guidance-colleges [https://perma.cc/6H43-V7EB].

302. *See supra* Section II.A.3.

response to past discriminatory practices rather than advantages based on sex itself.[303]

Just because women and men may be provided the same opportunities does not mean that women will have the same access to actually fulfilling the end goal and reaching the end result. For example, if women and men are both given the same opportunity to apply for a job, this does not mean that the woman will be hired. Similarly, one would think that hygiene products used by both men and women would be the same price. Since substantive equality is focused less on facial neutrality and more on the outcome, a substantive equality ideology in the United States would allow women to receive advantaged opportunities over men that result in the same or similar outcomes. For example, giving women preferential treatment in applying for jobs that results in similar numbers of male and female hires,[304] or at the very least mandating paid maternity leave and lactation breaks for new moms.[305] The question that the Supreme Court and some South African Justices seem to be concerned with is: if laws were implemented that benefit or provide advantages to women, will this "promote equality" or is providing support to women as a previously disadvantaged class substantiating their status as second-class citizens?[306] Providing an advantaged opportunity for women as a historically disadvantaged class will allow them to step into the same playing field as men. A policy may be facially discriminatory, yet if the result is a balancing between the sexes, that balance seems like it should constitute a compelling state interest in a nation dedicated to freedom.

F. Constitutional Classification – The South African Way

It is evident that the fight for gender equality is a multi-front civil war battling for textual inclusion as well as substantive change. The Equal Rights Amendment and inclusive language coupled with Congress' power to enact legislation to further the ERA is a step we need to conquer textual inclusion. However, the next step is changing the way equal protection claims are analyzed in court by ditching the attempt at establishing three distinct levels of scrutiny and move to a case-by-case analysis similar to the unfair discrimination test in South Africa. The levels of scrutiny have not been uniformly applied within their respective categories – courts have been

303. Race, also, should be a substantial factor in receiving advantages to discount past discriminatory practices, but race alone should not be the basis for the advantages.

304. In the initial affirmative action cases, the Supreme Court recognized that affirmative action should not be in place forever, therefore, when equality is achieved then these such laws would be unfair.

305. And other "benefits" that just equalize the experience of women who have babies and are also trying to work.

306. KENDE, *supra* note 5, at 91 ("Do laws that advantage women actually promote equality or demonstrate that women remain second-class citizens who need assistance? Should laws that have a disparate impact on women automatically be illegal even if there is no discriminatory animus?").

applying more of a "sliding scale" analysis allowing them to apply stricter or more lenient levels of scrutiny as they see fit.[307] Since the current scrutiny system is not providing strict guidance – all types of discrimination should just be treated with the same level of severity.[308] Even though gender encompasses inherent differences where race has none, South Africa has been able to treat them both as suspect classes while applying a fairness test to account for the necessary differences between women and men.

One type of discrimination should not be more important than another – that is the whole point of equality. The United States should not tolerate any differential treatment that disadvantages groups of people. However, an effort should be made to look at differential treatment in the context of fairness versus equality. As has been made clear, women and men have biological differences that *warrant* differential treatment. A basic formal equality model may suggest that women do not deserve advantages to account for the burdens imposed by these differences; whereas an equity model would propose allowing differential treatment where women are provided advantages that place them on equal footing with men.

V. CONCLUSION

Gender equality issues have shifted from a simple differentiation between men and women to include discrimination based on sexual orientation and gender identity. Although this expansion may have complicated the interpretation of equality laws, it has enhanced the reality that gender rights and women's rights are human rights and the fight for equality will not be over until everyone is equal.

"There is no greater inequality than the equal treatment of unequals."[309] Equal opportunity for men and women is *not* equality – true equality is the realization of equal *outcomes* for men and women.[310] American women have

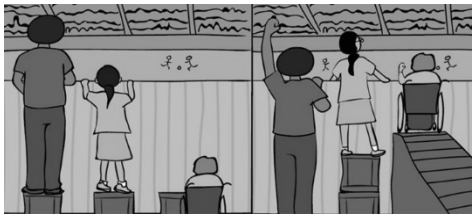
307. *See supra* Section II.A.3..

308. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring). Furthermore, I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 (1985) (Marshall, J., dissenting).

309. This quote has been credited to several men throughout history, but regardless of who said it, the message is especially relevant to the fight for gender equality. Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting) ("It was a wise man who said that there is no greater inequality than the equal treatment of unequals"); ARISTOTLE, POLITICS 62 Part IX (1999) (translated by Benjamin Jowett).

310. Equal opportunity means nothing where there is not equal ability.

been constitutionally less than men for centuries through the lack of inclusion in the Constitution and systemic sexism that pervades every aspect of our society. It is time for the United States to become a Twenty-First Century democracy by implementing large-scale change in Equal Protection analyses and redefining the American ideal of equality. By shifting the ideal from formal equality to substantive equality, we can focus a new mindset on providing equal outcomes to differently abled groups.[311]



311. Picture Citation: Lamont Davis, *Guess What, Equity and Equality Are Not the Same Thing*, EDUCATIONPOST (Nov. 3, 2016) https://educationpost.org/guess-what-equity-and-equality-are-not-the-same-thing/.